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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1566

SARGENT-WELCH SCIENTIFIC COMPANY, *Petitioner*

vs.

VENTRON CORPORATION AND
VENTRON INSTRUMENTS CORPORATION, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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VENTRON CORPORATION AND
VENTRON INSTRUMENTS CORPORATION, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Sargent-Welch Scientific Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on December 6, 1977, with rehearing denied on January 31, 1978.

OPINIONS BELOW

The opinion of the court of appeals is reported officially at 567 F.2d 701; it is reported unofficially at 1977-2 Trade Cases ¶ 61,761; and it is reprinted as Appendix C, *infra,* pp. 4a-24a. The court filed along with its opinion an unpublished order which is reprinted as Appendix D, *infra,* pp. 25a-31a.

The opinion of the district court has not been reported officially; it is reported unofficially at 1976-2

Trade Cases ¶ 61,146; and it is reprinted as Appendix F, *infra,* pp. 33a-56a.

JURISDICTION

The judgment of the court of appeals was entered December 6, 1977, and it was corrected on December 21 ***nunc pro tunc*** the date of entry (Appendix B, *infra,* p. 3a). On January 31, 1978, the court entered an order modifying its opinion and denying rehearing (Appendix A, *infra,* pp. 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Respondents (through their Cahn division) manufacture two separate and distinct lines of scientific instruments. Their line of electromagnetic microbalances is unique, and it is essential for performing microweighing experiments; they have a monopoly in that market. Their line of millibalances, however, faces competition from substitute products. Respondents deliberately combined these two diverse product lines into a single "full line"; formulated a dealer reduction program under which "carrying the full Cahn line" was an important criterion for determining which dealers to retain; and used as one reason for terminating the dealerships of petitioner and two other dealers their refusals to handle the millibalances. Every microbalance dealer who survived the dealer reduction program agreed to handle the millibalance line.

The question presented is whether the court of appeals erred in refusing to hold as a matter of law that respondents' conduct constituted a misuse of monopoly power in violation of Section 2 of the Sherman Act.

STATUTE INVOLVED

Section 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 2, as amended, reads as follows in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony * * *.

STATEMENT

1. The Proceedings Below

Petitioner, the plaintiff in the trial court, commenced this private antitrust action in September 1972 in the United States District Court for the Northern District of Illinois (A. 1).[1] The amended complaint, filed under Section 4 of the Clayton Act, 15 U.S.C. § 15, alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Section 3 of the Clayton Act, 15 U.S.C. § 14 (A. 32-45). After trial on issues of liability only, the district court entered judgment for respondents, the defendants below, on all counts (App. E, p. 32a).

On appeal, the Seventh Circuit affirmed the district court's dismissal of petitioner's claims under Section 1 of the Sherman Act and Section 3 of the Clayton Act

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[1] "A. —" citations are to the parts of the record printed in Plaintiff-Appellant's Appendix in the Seventh Circuit. "Tr. —" refers to the unprinted trial transcript; "PTX —" refers to plaintiff's trial exhibits. Unprinted deposition testimony is cited by the deponent's name and the volume and page of the typed transcript.

(App. C, pp. 9a-11a, 13a-14a). It also affirmed the dismissal of the monopolization claims under Section 2 of the Sherman Act, but only insofar as they were based on allegations of resale price maintenance (*id.* at 12a-13a).

Petitioner also claimed that respondents had "misused monopoly power in violation of § 2 [of the Sherman Act]" by "full-line forcing" (*id.* at 12a, 22a). The appellate court vacated the district court's judgment on that issue and remanded the cause for further findings as to respondents' anticompetitive "purpose." The question before this Court is whether the court of appeals erred as a matter of law in not entering judgment in petitioner's favor on the full-line forcing issue.

2. The Parties

Cahn Instruments Company ("Cahn") is an unincorporated division of respondent Ventron Corporation ("Ventron") (App. C, p. 5a). Cahn "is the world's leading producer of electromagnetic microbalances" (*e.g.*, PTX 25, A. 80).[2]

The business of petitioner Sargent-Welch Scientific Company ("Sargent-Welch") includes the distribution of scientific and laboratory equipment (App. C, p. 5a). Petitioner became an authorized dealer (or distributor, as the Cahn dealers were sometimes called) of Cahn electromagnetic microbalances in

[2] During August and September 1976, over 90% of Ventron's common stock was acquired by Thiokol Corporation, a huge, diversified manufacturing firm. Moody's *Indust. Manual* 3995 (1977).

1963; its dealership was terminated by Cahn in April 1971 (*ibid.*).[3]

3. The Products Involved

(*a*) Cahn manufactures a complete line of electromagnetic microbalances for "use in a number of diverse and scientifically complex applications" (App. C, p. 17a). "By and large, microbalances were purchased by technically sophisticated customers who needed them for microweighing applications" (*ibid.*). Most of those applications, some 80%, "would not be feasible without an electromagnetic microbalance" (*id.* at 17a and fn. 15). "Thus an end-user who had certain applications had little choice but to purchase a microbalance" (*id.* at 18a).[4]

Anyone who needed (or wanted) a microbalance had little choice but to purchase a Cahn model. Over the years, Cahn made more than 90% of all domestic electromagnetic microbalance sales (*id.* at 15a). Ventron recognized that "[w]e are virtually alone in this

[3] Balances are scientific instruments that "are used to determine accurately the weight and other characteristics of a sample" (App. F, p. 432). A microbalance is sensitive to—*i.e.*, it can detect, measure and display—a change in weight as minute as 1/1,000,000 gram or one microgram (App. C, pp. 4a-5a and fn. 2). The balances closest in sensitivity to microbalances are called semi-microbalances; they are ten times more coarse, with the capability of sensing a weight change of 1/100,000 gram or ten micrograms (*id.* at 5a and fn. 4; App. F, pp. 34a-35a).

[4] The importance of electromagnetic microbalances to a scientific instruments dealer is illustrated by the district court's finding that petitioner's injury from the termination included lost sales of recorders and "other products sold in conjunction with Cahn electromagnetic microbalances and accessories" (App. F, p. 542). Those losses were substantial, amounting to 40% of petitioner's total lost sales and 45% of its lost profits (PTX 572).

market" (PTX 59, A. 92), and the court of appeals "conclude[d] that Cahn held a monopoly in the electromagnetic microbalance submarket" (App. C, p. 19a).

(*b*) During 1969 and 1970 Cahn introduced "a new family of instruments" called millibalances (PTX 235, A. 135). Those balances "were less sensitive than the microbalances and therefore were used in different applications" (App. C, p. 5a, (fn. omitted)). The millibalance applications were less sophisticated, *e.g.*, "'bucket chemistry' as opposed to microanalysis" (A. 299), and, as a result, the millibalances were designed to be "considerably less expensive" than Cahn's microbalances (App. F, p. 46a; A. 331, 333). "[W]hen Cahn introduced the millibalances, it saw itself appealing to a new end-user market" where it would be in "competition with the coarser balances" (App. C, p. 19a).

Cahn's recognition of the different end-user market for its millibalances led it to attempt to franchise a new set of dealers for those products alone. In its letters soliciting prospective "industrial" dealers, Cahn explained that in the past it had sold through "laboratory supply houses" but the millibalance was "so different that we feel we need to take on a whole new set to dealers to help us sell it" (PTX 222, A. 122). That effort was unsuccessful.

The millibalance line also was offered to Cahn's existing microbalance dealers, and each resisted handling it (PTX 912, p. 2 after third tab). The dealers considered the millibalances too expensive to be resold for an adequate profit (A. 141; Tr. 489, 502, 769-771, 773), and they were concerned about their "serious quality problems" (A. 9), which included an inability

to meet specifications (E. Brown dep., pp. 8-11, 38-39, 42; Tr. 789-790; T. Watson dep., pp. 29-30). This resistance troubled Cahn's managers, who "wanted to be sure that all the dealers handled that instrument in order to keep the sales up" (A. 204). Toward that end, throughout 1969 and 1970 Cahn's managers discussed the dealers' unfavorable reaction to the millibalance line and ways "to facilitate them handling more millibalances" (A.203). A "policy" evolved—

> to have the dealers handle the Millibalance. They [Cahn's managers] wanted them to handle them as part of the line just like they handled the other instruments. [A. 204.]

By 1971 the policy of "carrying the full Cahn line" had become an important factor in determining which dealers to retain and which to terminate (Yablonka dep., Vol. 3, pp. 50, 60-62).

4. Cahn's Termination of Petitioner's Dealership

As the court of appeals observed, Cahn's termination letter "noted Sargent-Welch's refusal to carry the new millibalance line" (App. C, p. 6a). Cahn's candid denial of petitioner's request for reinstatement elaborated upon that point (PTX 9, A. 70):

> Second, the fact that you did not handle our Millibalance line was a very important consideration in my evaluation.

The letter continued, "all but two of our dealers carried the complete line"; "the other dealer we terminated was the second dealer who didn't handle the Millibalances"; and "I don't personally feel we should make any special considerations for one of our dealers unless the same considerations are offered to the

others" (*ibid.*). The author of that letter and his successor both testified that Cahn would have continued petitioner as a dealer for an additional "trial period" had petitioner agreed to handle the millibalance line (Yablonka dep., Vol. 3, pp. 66-67, Vol. 4, p. 156; Faley dep., Vol. 1, pp. 99-101).

5. Cahn's Dealer Reduction Program

Petitioner's termination was part of "Cahn's dealer reduction program," as the courts below found (App. C, p. 6a). The purpose of that program was " 'to consolidate sales among Cahn's more effective dealers,' " (*ibid.*), *i.e.*, those "who are receptive, who are interested, and who are inclined to respond positively when presented with new products . . ." (A. 264; Lauenstein dep., Vol. 1, pp. 54-55; Yablonka dep., Vol. 4, pp. 84, 156-165).

Three dealers were terminated pursuant to the dealer reduction program: Petitioner, Curtin Scientific Company ("Curtin") and Preiser Scientific, Inc. ("Preiser"). Curtin was the "second dealer" who had declined to handle the millibalances (See PTX 9, A. 70). And, in 1972, Preiser dropped the "Millibalance product line" and was terminated (PTX 13, A. 75-77).[5] Every other Cahn dealer ultimately handled both Cahn's electromagnetic microbalances and its millibalances (Tr. 2105-2106; Weil dep., Vol. 2, p. 60). Indeed, by 1974 Curtin was included as a full line dealer; it

[5] Curtin's termination letter pointed out that "since Curtin recently re-declined handling our millibalances, you do not represent the complete Cahn dealer product line" (PTX 12, A. 74). Preiser's termination letter referred to its "partial handling of our product line" (PTX 13, A. 76).

had been reinstated as an electromagnetic microbalance dealer after it agreed to handle Cahn's millibalances (Tr. 2107; Yablonka dep., Vol. 4, p. 140).

6. The Decisions Below

The district court found that Cahn did not have a monopoly and that, in those circumstances, its objective of having "full line" dealers was lawful. As the court stated (App. F, p. 37a, emphasis added):

> Plaintiff's refusal to handle the Millibalance may have been one reason why defendant terminated plaintiff's dealership, but *the motive* was not to enforce a monopoly of microbalances. It *was to have active and profitable dealerships which handled the full line,* a reasonable and lawful objective.

Earlier in its opinion, the court had concluded that Cahn not only lacked a "monopoly of microbalances," but that Cahn's "share of the entire balance market is small, perhaps 8 percent" (*id.* at 35a).

The court of appeals set aside the district court's market definition finding as "clearly erroneous," holding that Cahn enjoyed an overwhelming monopoly position, exceeding 90%, in the market for electromagnetic microbalances (App. C, p. 15a). The remaining issue was "whether there was a misuse of the monopoly power resulting in injury to [petitioner's] business or property" (*id.* at 20a, fn. omitted). The court correctly recognized that "Section 2 is violated upon a showing of the existence of monopoly power . . . and the general intent to abuse that power" (*id.* at 14a-15a). Elaborating upon that point, it held that a "specific intent to monopolize need not be shown to establish the offense of monopolization when the mo-

nopolist undertakes anticompetitive actions" such as acts which have a "tendency to foreclose competitors from access to markets or customers" (*id.* at 20a).

The court concluded, however, that the findings that Cahn had monopoly power in the electromagnetic microbalance market and "that Sargent-Welch's 'refusal to handle the millibalances may have been one reason why [Cahn] terminated' the dealership" were insufficient, as a matter of law, to support a judgment for petitioner (*id.* at 22a). The Seventh Circuit therefore remanded the cause to the district court for further findings as to whether Cahn's anticompetitive purpose extended to its "surviving dealers," *i.e.*, as to whether (*ibid.*):

> (a) a purpose of the dealer reduction program was unilaterally to use Cahn's market position in microbalances to further sales of millibalances to surviving dealers by causing them to fear that unless they handled millibalances they would not be able to buy microbalances, or (b) that, although the dealer reduction program did not have such a purpose, Cahn's action in terminating Sargent-Welch did.

REASONS FOR GRANTING THE WRIT

This case presents a question of major significance in the proper interpretation of Section 2 of the Sherman Act, 15 U.S.C. § 2, the prohibition against unilateral acts of monopolization. Respondents' Cahn division has long manufactured a unique product, its line of electromagnetic microbalances, and it has monopoly power in that market. In 1969, Cahn introduced a new line of products called millibalances; they "appeal[ed] to a new end-user market," a market in which

Cahn faced competition (App. C, p. 19a). After meeting dealer resistance to its millibalance line, Cahn combined its two diverse product lines into one "full line" and, as the district court found, made a decision to market through "active and profitable dealerships which handled the full line" (App. F, p. 37a). That decision was implemented by means of a dealer reduction program. "[A]ll the Cahn dealers who survived the dealer reduction program carried millibalances," as the court of appeals found (App. C, p. 23a fn. 22); and every dealer who declined the millibalances was terminated, including petitioner.

The lower courts found that Cahn did not condition the sale of its microbalances on the purchase of its millibalances nor did it threaten or coerce its microbalance dealers into handling the millibalances (App. C, p. 14a).[8] The court of appeals held that, in view of those findings, Cahn's unilateral dealer terminations would violate Section 2 only if Cahn had a "purpose" to cause its "surviving dealers" to fear that they too would be terminated if they declined the millibalances (*id.* at 12a). That holding, if permitted to stand, will seriously undermine the fundamental rationale on which monopolistic conduct has been condemned for thirty years, since this Court's decision in *United States* v. *Griffith*, 334 U.S. 100 (1948).

The defendants in *Griffith* were movie theatre owners who operated in closed towns where they had a monopoly as well as in open towns where they faced

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[8] Those findings were the basis on which the courts ruled against petitioner on its tie-in claims under Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 3 of the Clayton Act, 15 U.S.C. § 14 (App. C, p. 14a).

competition. The defendants used "their circuit buying power to obtain films. Their closed towns were linked with competitive towns." *Id.* at 109. That linkage, this Court held, was a "misuse of monopoly power" in violation of the Sherman Act, § 2. *Id.* at 108.

In reaching that result, the Court left untouched the lower court's findings that the defendants did not employ "threats or coercion," and that they "did not condition the licensing of films in any competitive situation on the licensing of such films in a non-competitive situation, or *vice versa.*" *Id.* at 104. The Court also acknowledged that "[l]arge-scale buying is not, of course, unlawful *per se*" and can be used to "yield price or other lawful advantages to the buyer." *Id.* at 108. Moreover, the Court recognized that in an earlier decision involving similar conduct, *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944)—

> the buying power was used for the avowed purpose of eliminating competition and of acquiring a monopoly of theatres in the several towns, *while no such purpose was found here.* [*Id.* at 105, emphasis added.]

The Court ruled, however, that it is "not always necessary to find a specific intent to restrain trade or build a monopoly in order to find that the anti-trust laws have been violated" (*id.* at 105); where there is "no intent or purpose" to monopolize, the statute is nonetheless violated if monopolization is "a necessary and direct result" of the defendant's acts (*id.* at 106). Applying those principles to the facts in *Griffith,* the Court concluded (*id.* at 107):

> Though [defendant] makes no threat to withhold the business of his closed or monopoly towns unless the distributors give him the exclusive film

> rights in the towns where he has competitors, *the effect is likely to be the same where the two are joined.* When the buying power of the entire circuit is used to negotiate films for his competitive as well as his closed towns, he is using monopoly power to expand his empire. And even if we assume that a specific intent to accomplish that result is absent, *he is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did.* [Emphasis added.]

The same conclusion is compelled in the instant case. Cahn linked its monopoly products and its competitive products into one full line. Its competitive products were undesirable and were resisted by the dealers, yet every microbalance dealer who was not terminated ultimately agreed to handle them. Cahn's "motive," as the district court found, was to have "dealerships which handled the full line" (App. F, pp. 37a-38a), and Cahn implemented that motive by establishing a full line criterion for dealer retention (*supra,* pp. 6-7). The surviving dealers did what Cahn wanted: they agreed to handle its millibalances. Petitioner thus established that the inevitable results of Cahn's full line policy did, in fact, come to pass. Those results were necessarily anticompetitive—their tendency being to "foreclose [millibalances] competitors from access to markets or customers" (see App. C, p. 20a). See *Northern Pac. Ry.* v. *United States,* 356 U.S. 1, 5 (1958).

The decision of the court of appeals to remand the cause for a finding as to whether Cahn had a purpose to accomplish the "necessary and direct" consequences of its action improperly ignores the holding of *Griffith* that a finding of monopolistic purpose or intent is not

essential to establish a violation of Section 2. The decision below also is in conflict with the decision in *Bragen* v. *Hudson County News Co.*, 321 F.2d 864, 869 (1963), where the Third Circuit squarely held that a monopolist's termination of a dealer "because he refused to sell or display the unwanted items" would, on those facts alone, violate Section 2. See also, *Smith-Kline Corp.* v. *Eli Lilly & Co.*, Third Circuit, No. 77-1232 (April 3, 1978).

That Cahn's dealer termination program may have had some lawful aspects is, of course, no defense, as the court of appeals apparently recognized (see App. C, pp. 20a-21a). *E.g., Continental Ore Co.* v. *Union Carbide & Carbon Co.*, 370 U.S. 690, 702 (1962). Equally irrelevant is the district court's finding that the program was undertaken " 'primarily for the legitimate objective of maintaining sales and profits' " (App. C, p. 22a). The Fifth Circuit has correctly interpreted *Griffith* to mean that "monopolistic conduct . . . cannot be defended on the ground that it was only the exercise of legitimate business judgment." *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 431 F.2d 334, 339 (5th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971). Respondents' conduct violates Section 2 as interpreted in *Griffith*, and the Seventh Circuit's remand for additional findings should be reversed. The cause should be remanded with instructions to enter judgment in favor of Sargent-Welch on the issue of liability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 1, 1978

Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604
January 31, 1978.

Before: Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge

No. 77-1082

SARGENT-WELCH SCIENTIFIC COMPANY, *Plaintiff-Appellant*,

vs.

VENTRON CORPORATION and VENTRON INSTRUMENTS CORPORATION, *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 72-C-2330

Thomas R. McMillen, *Judge.*

Order

The court having considered the petitions for rehearing and plaintiff-appellant's motion to correct opinion, the opinion filed December 6, 1977, is modified as follows:

On page 13, in note 15, the second sentence and the bracketed citation following it are deleted.*

On page 14, in line 22, "not" is deleted and "the" is changed to "hardly any"; and in note 18 "efficiently" is inserted at the end of the third line.*

On page 3, in line 15 and page 19, line 10, the word "purchases" is substituted for the word "sales." *

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* These corrections have been incorporated into the Seventh Circuit's opinion as reprinted in Appendix C, *infra*.

The petitions for rehearing are DENIED. The motion of plaintiff-appellant to correct opinion is GRANTED.

On consideration of the suggestionfor rehearing in banc filed in the above-entitled cause by defendants-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing in banc. Accordingly,

IT IS ORDERED that the aforesaid suggestion for rehearing in banc be, and the same is hereby, DENIED.

APPENDIX B

Opinion by Judge Tone
Unpublished Per Curiam Order

(CORRECTED AS OF DECEMBER 21, 1977)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

December 6, 1977.

Before: Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge

No. 77-1082

SARGENT-WELCH SCIENTIFIC COMPANY, *Plaintiff-Appellant*,

vs.

VENTRON CORPORATION and VENTRON INSTRUMENTS CORPORATION, *Defendants-Appellees*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 72-C-2330

Thomas R. McMillen, *Judge*.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART; VACATED AND REMAINED IN PART, in accordance with the opinion of this court filed this date and of the order of this court entered this date. Each party shall bear its own costs on appeal.

APPENDIX C

[CAPTION OMITTED IN PRINTING]

ARGUED JUNE 10, 1977—DECIDED DECEMBER 6, 1977

Before SWYGERT, SPRECHER and TONE, *Circuit Judges.*

TONE, *Circuit Judge.* This is an action under the Sherman Act, 15 U.S.C. §§ 1 and 2, and § 3 of the Clayton Act, 15 U.S.C. § 14, for wrongful cancellation of a dealership. After a bench trial on the issue of liability, the District Court found in favor of the defendants. We affirm in part and vacate and remand in part.

The gravamen of the complaint, as amended, is, in the words of plaintiff's brief,

> that defendants (through their Cahn division) unlawfully terminated plaintiff's "electromagnetic microbalance" dealership in furtherance of Cahn's resale price fixing and tie-in arrangements, and as part of a dealer reduction plan which was intended to diminish the competition faced by Cahn and its favored dealers so as to maintain or improve Cahn's dominance in the market for electromagnetic microbalances and to enhance Cahn's position in the market for a new line of products called "millibalances."

Cahn Instruments Company was formed in 1956 to develop and manufacture a device for precision weighing, the electromagnetic microbalance.[1] The company succeeded

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[1] In a pre-trial stipulation, the parties described the electromagnetic weighing principle as one

> whereby a sample of unknown weight is balanced by the force produced by an electric current in a coil in a magnetic field. The weight of the unknown sample is determined by measuring the amount of electrical energy used in balancing the sample, and calibrating this measurement against known weight standards.

in making and selling a line of balances that could be used to weigh small samples to one microgram precision or even a fraction thereof.[2] In 1967 the company was acquired by Ventron Corporation, which operates Cahn as an unincorporated division.[3] In 1969 Cahn introduced a line of less expensive balances called "millibalances," which also operated electromagnetically but were less sensitive than the microbalances and therefore were used in different applications.[4]

In 1971 Cahn sold a total of 500 balances in the United States for a total of $608,400. Its total sales in that year were $1,400,000.

From the beginning, Cahn balances were marketed through dealers who also sold a variety of other scientific and laboratory equipment. One of them was E. H. Sargent Company, which became a dealer in 1963 and continued as such after it merged with Welch Scientific Company in 1968 until it was terminated by Cahn in April 1971. At the time of termination, Sargent-Welch had twelve branches in the United States and Canada and represented approximately 3,000 manufacturers of various types of scientific and laboratory equipment. Its annual sales are approxi-

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[2] A microgram is one-one millionth of a gram (0.000001 or 10^{-6} grams); a gram is equal to 0.035 ounces.

[3] Until 1974 Cahn operated as a division of Ventron's wholly-owned subsidiary Ventron Instruments Corporation, which accounts for the latter being named as an additional defendant in this case. In that year Ventron liquidated Ventron Instruments and has since held Cahn's assets directly. Both defendants, including the Cahn Division, are collectively referred to in this opinion as "Cahn" or "defendant."

[4] The original millibalances, introduced in 1969, had ranges that varied with the size of the sample: they could weigh 1 gram to a 1 milligram (one-one-thousandth of a gram) precision, a 100 milligram sample to 100 micrograms, and 10 milligrams to 10 micrograms. The last and most sensitive range was later deleted from the balances' specifications.

mately $60,000,000. Its annual purchases of Cahn balances at the time of termination were less than $40,000.

In his letter terminating Sargent-Welch as a dealer, Cahn's Director of Marketing stated that Cahn was undertaking a careful evaluation of its "dealership coverage" for the purpose of "optimizing the number of dealers handling the Cahn product line." He then pointed out that Sargent-Welch's purchases from Cahn had been decreasing each year since 1968 and that first quarter sales indicated that 1971 would also be a disappointing year. He also noted Sargent-Welch's refusal to carry the new millibalance line. As a final reason for Sargent-Welch's termination, the letter referred to "a definite lack of exposure of Cahn products in Sargent-Welch advertising and in your booths at trade shows." In the next year Cahn gave similar explanations in terminating two other dealers.

Cahn's dealer reduction program for "optimizing the number" of its dealers was adopted primarily, the District Court found, "to consolidate sales among its [Cahn's] more effective dealers." The court also found that the Sargent-Welch termination was based on this plan as well as on that company's sharp decline in . . . performance on behalf of Cahn" and the absence of any prospect of improvement of that performance. Further, the court found,

> Cahn's termination of Sargent-Welch was not anti-competitive in either purpose or effect. Plaintiff's distributorship contract was terminated because of its poor performance. Neither an attempt at tying sales nor an attempt to enforce illegal resale price maintenance, nor a plan to monopolize, attempt to monopolize or eliminate competition was proved to be a factor in the termination.

Elsewhere in his findings, however, the judge said that "[p]laintiff's refusal to handle the millibalances may have been one reason why defendant terminated plaintiff's dealership . . . ."

Findings bearing specifically on the theory of a tie-in or full line forcing between microbalances and millibalances were that Sargent-Welch had "failed to prove that defendant attempted to coerce plaintiff into handling [its] new products by, for example, threatening termination"; that Cahn "did not require its dealers to handle the millibalance models as a condition to continuing to be a dealer"; and that Sargent-Welch had not proved that "Cahn refused to sell its microbalances to a dealer who would not handle the millibalances."

All Cahn dealership agreements contained fair trade clauses requiring dealers to adhere to fixed resale prices in fair trade jurisdictions. Sargent-Welch alleged that it had been terminated because of its price-cutting activities and also because the dealer reduction program was designed to eliminate price-cutting among Cahn dealers in general.

Approximately one month before Sargent-Welch was terminated, its branch in Anaheim, California, submitted a bid to the University of California offering Cahn balances at 6 percent below the list price. California at that time was a fair trade state. Cahn's Director of Marketing wrote a letter to the Sargent-Welch home office describing the University of California bid as "an obvious price cut and a clear violation of our Fair Trade Agreement" and asking for an explanation "[b]efore we take any action." Sargent-Welch replied by disclaiming knowledge of the situation and referring Cahn to the branch manager.

The District Court found that, because Cahn sold balances directly to end-users in California in competition with its dealers, it could not claim the protection of the fair-trade exemptions from Sherman Act coverage, the

Miller-Tydings Amendment [5] and the McGuire Act,[6] which were in effect at that time.[7] Cahn's fair trade program in California was therefore held to be horizontal price-fixing in violation of § 1 of the Sherman Act. The court continued.

> However, since defendant did not terminate plaintiff for price-cutting, the point is unavailing. Furthermore, plaintiff has failed to prove that defendant's price maintenance agreements caused a loss of sales or profits or other injury to its business in any state where the agreements were invalid.

The District Court made the following additional findings with respect to the price-cutting charges:

> Cahn carried out its fair trade program in good faith and, to the best of its knowledge, in accordance with the requirements of the applicable statutes. Cahn dealers from time to time communicated to Cahn their concern about fair trade violations. But Cahn never agreed with any of its dealers to fix or control prices, except where authorized by applicable fair trade laws, and all Cahn dealers, including plaintiff, knew and understood that the minimum selling prices established by Cahn need only be adhered to in those states and as to those sales where fair trade was applicable. All Cahn dealers, including plaintiff, in fact sold Cahn balance products at less than the minimum retail selling prices established by Cahn on certain occasions, usually when necessary to meet competition.

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[5] Act of August 17, 1937, 50 Stat. 693 (formerly a part of 15 USC §1).

[6] Act of July 14, 1952, 66 Stat. 632 (formerly in 15 U.S.C. § 45(a)).

[7] Both were repealed by the Act of December 12, 1975, 89 Stat. 801.

In ruling on the monopolization charge, the court found that the relevant market was not microbalances, as Sargent-Welch contended, but all "precision balance[s]," *i.e.*, balances weighing only 1/100,000 of a gram (see note 4, *supra*), and that, because Cahn possessed only an 8 percent share of that market, it did not have a monopoly. The court also found,

> [E]ven assuming that Cahn had monopoly power, plaintiff . . . failed to show that Cahn grew as a consequence of anything other than superior products, business acumen or historic accident, or that Cahn used such power in furtherance of the alleged monopoly.

I. *Price-Fixing*

Sargent-Welch's price-fixing theory is predicated on the contention that Cahn sold balances in competition with its dealers, thereby forfeiting the benefit of the exemption of fair trade laws from antitrust prohibitions. In *United States v. McKesson and Robbins, Inc.*, 351 U.S. 305, 310-311 (1956), the Supreme Court held that enforcement of a fair trade program under these circumstances was illegal *per se*.

Cahn did not solicit direct sales of products sold through dealers or hold itself out as a dealer in these products. Customers who asked Cahn for assistance in selecting a balance were referred to a dealer. Cahn did fill unsolicited orders for these products, paying a commission to a dealer who had influenced the sale. Because of a number of such direct sales in California, the District Court held that Cahn's fair trade program was illegal in that state.[8] The

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[8] The court's findings with respect to Cahn's competition with its dealers are somewhat ambiguous. In paragraph 40 of its findings, the court described the Cahn policy on unsolicited orders; in paragraph 41 it noted Cahn's direct sales of two types of specialized balances that were never sold through dealers; and in paragraph

Court declined, however, as we have observed, to hold the company's nationwide fair trade program illegal. Although the court failed to articulate a basis for this distinction, defendant points out that Sargent-Welch failed to prove the volume of direct sales in other states or even to point out which states recognized fair trade at that time. Sargent-Welch argues that the Cahn invoices of direct sales to end-users, which were introduced along with approximately 1600 other trial exhibits, were sufficient proof of the illegality of Cahn's entire fair trade program. But dumping into the record evidence of such dubious intelligibility, without a showing of which sales, if any, were made in competition with dealers, *cf. Snap-On Tools Corp. v. FTC*, 321 F.2d 825, 833-835 (7th Cir. 1963), and apparently without tabulation, analysis, or explanatory testimony, was hardly sufficient to require the court to decide the issue in favor of plaintiff, especially in the absence of active solicitation of business in competition with the dealers. Moreover, as the District Court found, Sargent-Welch failed to prove that it suffered injury from Cahn's resale price maintenance. *Cf. Kestenbaum v. Falstaff Brewing Corp.*,

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42 it noted Cahn's sales to original equipment manufacturers who incorporated modified Cahn balances into other equipment, which was then resold. The court made no finding—and we can see no evidence in the record—that the non-dealer items referred to in paragraph 41 were competitive in some other way with dealer items or that dealers also sold to OEM accounts. Ordinarily, there is no fair trade violation unless this type of competition exists, see *Snap-On Tools Corp. v. FTC*, 321 F.2d 825, 833-835 (7th Cir. 1963); *Esso Standard Oil Co. v. Secatore's, Inc.*, 246 F.2d 17, 20 (1st Cir.), *cert. denied*, 355 U.S. 834 (1957); *Upjohn Co. v. Charles Labs, Inc.*, 277 F.Supp. 445, 450 (S.D.N.Y. 1967). Nevertheless, the court held that "[t]he activities described in part in pars. 40, 41 and 42 rendered defendant's fair trade agreement with plaintiff unenforceable in California . . . ." While this holding appears to be open to challenge, defendants do not press an argument on the point, and our disposition of the case makes it unnecessary to decide it.

514 F.2d 690, 694 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

Sargent-Welch also argues that Cahn attempted to enforce an illegal resale price maintenance program in non-fair trade states. The evidence was that Cahn maintained a policy of taking action against price-cutting only in fair trade jurisdictions. [Weil, Tr. 1918, 1973; Cassiano Dep. 79; *cf.* Preiser, Tr. 862.] The District Court found that Cahn suggested resale prices and exhorted its dealers to adhere to them but took no further action in non-fair trade states, and held that this conduct did not violate the law. We cannot say that this was error.

We have examined the conflicting evidence on the other price-fixing issues, *viz.*, whether price cutting by Sargent-Welch was a reason for its termination and whether Cahn's dealer reduction program was administered in furtherance of an illegal price-fixing scheme. With respect to these issues, the District Court found that Cahn did not terminate Sargent-Welch for price-cutting, and that

> Cahn never agreed with any of its dealers to fix or control prices, except where authorized by applicable fair trade laws, and all Cahn dealers, including plaintiff, knew and understood that the minimum selling prices established by Cahn need only be adhered to in those states and as to those sales where fair trade was applicable.

These findings are not clearly erroneous. Our detailed review of the evidence supporting them, being of no value as precedent, appears in an unpublished order filed with this opinion.

II. *Tie-in and Monopolization*

Because Cahn's strength in the market is relevant to both the issues of tie-in, or full-line forcing,[9] and monopolization, it is convenient to treat these issues together. Sargent-Welch's misuse-of-power argument includes the theory that Cahn used its market power to accomplish resale price maintenance. We dispose of this theory and the tie-in-by-agreement theory first, because we can do so without determining Cahn's market position. We then turn to the remaining monopolization question, which relates to full-line forcing.

A. *Misuse of Power for Resale Price Maintenance Program*

Sargent-Welch argues that a purpose of Cahn's dealer reduction program was to eliminate price competition among the remaining dealers and promote their adherence to resale prices established by Cahn, in violation of §§ 1 and 2 of the Sherman Act.[10] We think that the facts found by the District Court based upon the resale price maintenance evidence, in findings we have sustained as not clearly erroneous, are inconsistent with the existence

[9] Requisite elements of a § 1 violation are the presence of market power sufficient to enable the seller "to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market," *United States Steel Corp. v. Fortner Enterprises, Inc.*, 97 S.Ct. 861, 867-868 (1977) (*Fortner II*); and sales of the tied product resulting from the tie-in that are not insubstantial, *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 502 (1969) (*Fortner I*). While the presence of either is enough under § 3 of the Clayton Act, § 1 of the Sherman Act requires both. See *Moore v. Jas. H. Mathews & Co.*, 550 F.2d 1207, 1214 (9th Cir. 1977).

[10] As we point out in part II, C, *infra*, the use of monopoly power, even though lawfully acquired, for an unlawful purpose is a violation of § 2 of the Sherman Act. If the misuse results in an agreement or understanding, § 1 of that Act is also violated

of such a purpose. We therefore do not disturb the judgment on this ground.

B. *Tie-in by Agreement*

Sargent-Welch does not contend that there was a tie-in arrangement between itself and Cahn but that Cahn's "scheme of getting tie-ins" violated the law.[11] To establish a tying arrangement violative of § 1 of the Sherman Act or of § 3 of the Clayton Act the plaintiff must first prove an agreement or understanding between the seller and the buyer conditioning the seller's sale of one product upon the buyer's purchase of another. See *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5, 6 (1958):

> [A] tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.

See also *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211, 1223-1224 (3d Cir.), *cert. denied*, 97 S.Ct. 74 (1976); *McElhenney v. Western Auto Supply Corp.*, 269 F.2d 332, 338-339 (4th Cir. 1959). Coercion has been viewed as an essential element.[12] *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 614 (1953); *Ungar v. Dunkin' Donuts of America, Inc., supra*, 531 F.2d at 1224; *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307 (5th Cir. 1976). Of course, the agreement or under-

[11] Counsel for Sargent-Welch so stated in oral argument, adding that "this was a § 1 violation." We shall assume that counsel intended to rely on § 3 also, since his brief argues that § 3 was violated.

[12] The existence in a sales agreement of a condition which is initially desired by both buyer and seller should be sufficient. *Cf., e.g., Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), in which no significance was attached to the absence of coercion in the formation of the agreement.

standing need not be express but may be inferred from the circumstances. *Ungar v. Dunkin' Donuts of America, Inc., supra,* 531 F.2d at 1224. It is for the trier of fact to draw the inferences, however, and the district judge in the case before us found not only that Sargent-Welch "failed to prove that defendant attempted to coerce plaintiff into handling [its] new products by, for example, threatening termination," or that Cahn "refused to sell its microbalances to a dealer who would not handle the millibalance," but also that Cahn "did not require its dealers to handle the millibalance models as a condition to continuing to be a dealer." There was evidence to support these findings, including testimony of the Chairman of the Board, the President, and the Technical Director of Sargent-Welch that Cahn had made no threats to them and they knew of no threats to their company, and testimony of another terminated Cahn dealer called as a witness by Sargent-Welch that Cahn did not condition sales of its microbalances upon an agreement to purchase millibalances. Because the essential element of agreement or understanding is missing, Sargent-Welch has failed to establish a violation of § 1 of the Sherman Act or § 3 of the Clayton Act.

C. *Monopolization*

The findings just referred to do not dispose of the contention that Cahn violated § 2 of the Sherman Act by unilaterally using monopoly power in microbalances to force unwanted millibalances on its dealers;[13] for that section, unlike § 1, proscribes unilateral conduct. Section 2 is violated upon a showing of the existence of monopoly power,

[13] The theory that the termination was pursuant to a plan to use monopoly power over microbalances to monopolize the entire field of precision-weighing devices was disposed of by the District Court's finding that intent to monopolize the larger market was not proved. That theory is not urged in this court.

whether lawfully or unlawfully acquired," and the general intent to abuse that power. *United States v. Griffith,* 334 U.S. 100, 105-107 (1948). A private plaintiff relying on § 2, however, must demonstrate that he has been "injured in his business or property" by the defendant's conduct in order to obtain relief. Clayton Act § 4, 15 U.S.C. § 15. Thus we must determine not only whether monopoly power existed but, if so, whether there was evidence tending to show that Sargent-Welch suffered injury by reason of a misuse of that power by Cahn in the manner alleged. *Cf. United States v. Griffith, supra,* 334 U.S. at 107. We hold that, contrary to the District Court's holding, Cahn did have monopoly power, and that a remand is therefore necessary for findings on issues that court did not reach.

1. *The Relevant Market*

If electromagnetic microbalances constitute a relevant submarket for antitrust purposes, Cahn had a monopoly in that submarket, for despite its 8.2 percent share of the sales of all precision balances it accounted for over 90 percent of the sales of electromagnetic microbalances. The District Court, however, rejected Sargent-Welch's submarket contention, finding,

> The Cahn ELECTROBALANCE line has competed with a wide variety of products, including many balances with different designs and specifications which are not referred [to] as "microbalances" or "millibalances", and many products that are not balances.

We hold this finding clearly erroneous. *Cf. Telex Corp. v. International Business Machines Corp.,* 510 F.2d 894, 915 (10th Cir.), *cert. dismissed,* 423 U.S. 802 (1975).

[14] The District Court found that Cahn's market position was lawfully acquired. Sargent-Welch does not seriously challenge that finding, and we do not disturb it.

In determining what constitutes a relevant market for antitrust purposes, the goal is to "delineate markets which conform to areas of effective competition and to the realities of competitive practice." *L. G. Balfour Co. v. FTC,* 442 F.2d 1, 11 (7th Cir. 1971). The "area of effective competition" may be a small submarket supplying specialized products or services. See *Beatrice Foods Co. v. FTC,* 540 F.2d 303, 307-309 (7th Cir. 1976); *Cass Student Advertising, Inc. v. National Educational Advertising Services, Inc.,* 516 F.2d 1092, 1095 (7th Cir.), *cert. denied.* 423 U.S. 986 (1975). See also *United States v. Connecticut National Bank,* 418 U.S. 656, 664 (1974). In delineating a relevant submarket, we are to look at

> such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

The most important of these factors is uniqueness of the product's functions and therefore its uses. If two products are "reasonably interchangeable by consumers for the same purposes," they are considered to be in the same market. *United States v. E. I. duPont de Nemours & Co.,* 351 U.S. 377, 395 (1956); *United States v. Continental Can Co.,* 378 U.S. 441, 447-456 (1964). See *Bendix Corp. v. Balax, Inc.,* 471 F.2d 149, 161 (7th Cir. 1972), *cert. denied,* 414 U.S. 819 (1973). We have said on two relatively recent occasions, however, that a market definition "which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful." *Cass Student Advertising, Inc. v. National Educational Advertising Service, Inc., supra,* 516 F.2d at 1095, quoting from *L. G. Balfour Co. v. FTC, supra,* 442 F.2d at 11, which in turn quotes from *United States v. Bethlehem Steel Corp.,* 168 F.Supp. 576, 592 (S.D.N.Y. 1958).

Electromagnetic microbalances are used in a number of diverse and scientifically complex applications. Most would not be feasible without an electromagnetic microbalance.[15] Others could be performed, though less efficiently, with a less sensitive balance, or by the use of non-gravimetric techniques employing other types of laboratory equipment.[16] The extent of competition with microbalances in the latter type of application is far from clear. Testimony as to non-gravimetric techniques was largely hypothetical, and testimony as to balance sales lost to other manufacturers often failed to describe the characteristics of the competing balance or the frequency with which it was encountered. Yet the unmistakable imprint of the evidence is that competition was not significant. By and large, microbalances were purchased by technically sophisticated customers who needed them for microweighing applications. [See Gaskins, Tr. 593; J. Weil, Dep. Vol. I, 56-58; Pl. App. 297-298.] A customer would ordinarily not buy a microbalance if he intended to use it for tasks a much less expensive, coarser balance could perform.[17] [J. Watson Dep. 84-85; Pl. App. 365-366.]

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[15] Pat Gaskins testified that 80 percent of the weighings for which microbalances are used would have been impossible or impracticable before those instruments were developed. [Tr. 701-702]. Defendant has not called our attention to any contrary evidence and we have found none.

[16] For example, for magnetic susceptibility analysis, it would be possible to use one technique employing a conventional balance, another using a Cahn microbalance and still another using a nuclear magnetic resonator, a very expensive device. [P. Gaskins, Tr. 659-665, 720-724; Pl. App. 103-104, 228-229.]

[17] The District Court found that there was a functional overlap between Cahn microbalances and coarser balances, presumably because a Cahn balance could also be used to perform less precise weighings. But the evidence indicates that, in practice, such underutilization of a Cahn balance would be unusual: apart from being more expensive, the Cahn balances are unable to weigh large

Microweighing is beyond the maximum sensitivity of most conventionally designed balances. Originally, balances designed to weigh into the microgram range had to be used in an artificial environment on a foundation isolated from vibration, shielded even from the heat of the operator's body. The sample, in transit to and from the weighing device, could change weight sufficiently to upset the results. [Gaskins, Tr. 699-700.] Microbalances, on the other hand, are relatively impervious to vibration and temperature changes, are portable, and do not have to be set up on a level plane. [Gaskins, Tr. 583-584, 587; Leonard, Dep. 31, 234; G. Brown, Tr. 295-300; Pl. App. 180-182.] They can also be used in a vacuum and can be used with a recorder to measure weight changes over time—two more capabilities possessed by hardly any mechanical balances. [G. Brown, Tr. 316; Pl. App. 188.] The evidence showed that, because of these differences, mechanical balances were used only where microbalances could not be, as, for example, when the sample weight exceeded the capacity of a microbalance.[18] [See Brinkman, Dep. 80-83; Pl. App. 349-350; Pl. Ex. 201; Pl. App. 119.] Thus an end-user who had certain applications had little choice but to purchase a microbalance.

Examination of other factors outlined in *Brown Shoe* supports the conclusion that microbalances constitute a submarket. First, the evidence shows that Cahn viewed microbalances as a distinct market and itself as the market

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samples (capacities vary from one gram to 100 grams) and are more difficult to operate than a standard analytical balance. The exception would be the unusual situation in which another quality of the Cahn balance, such as its relative ability to withstand vibration, was needed.

[18] The evidence showed that Mettler's M-5 micro or semi-microbalance was used primarily for the weighing of Pregl absorption tubes, a function which Cahn balances could not efficiently perform. [Gaskins, Tr. 582; Leonard Dep. 50; Pl. Ex. 86; Pl. App. 97.]

leader: in 1969 the president of Ventron gave a speech in which he stated, "We are virtually alone in this market. Our products are patented. They are the recognized standard Microbalances for research use . . . ." [Pl. Ex. 59; Pl. App. 91.] Other documents indicate that Cahn retained this perspective throughout 1971, considering itself unaffected by competition from manufacturers of coarser balances or even mechanical balances weighing in the range of its microbalances [Yablonka, Dep. Vol. I, 87; Pl. App. 307; Pl. Ex. 21, 201, 234, 348], except with respect to the millibalances, which were viewed as a "small incursion" into the larger balance market. [G. Brown, Tr. 359; see also Faley Dep. Vol. I, 191; Pl. Ex. 230, 234.] A marketing analysis done for Cahn in 1969 came to the same conclusion. [Goldish Dep. 66; Pl. App. 368.]

Second, while Cahn shared a majority of its customers with other balance manufacturers [Gaskins, Tr. 702; Pl. App. 222], it did not sell to the whole spectrum of balance customers. [Goldish Dep. 108-109; Pl. App. 372.] Thus, when Cahn introduced the millibalances, it saw itself appealing to a new end-user market. [Pl. Ex. 222, 227; Pl. App. 122; Gaskins, Tr. 606-607; Pl. App. 217; see also Barthel Dep. Vol. II, 28; Pl. App. 293.] Later, when the millibalances developed a number of repair problems, Cahn attributed some of the difficulties to the lower level of technical sophistication possessed by its customers in the new market. [G. Brown Dep. 39-41.] Finally, Cahn's pricing structure was apparently unrelated to that of coarser balances. Moreover, because of Cahn's preeminence in the micro-weighing field, the demand for its microbalances was relatively insensitive to price changes. [Gaskins, Tr. 608; Faley Dep. Vol. II, 123.] This was not true with respect to the millibalances, which, as we have said, were in competition with the coarser balances. [Faley Dep. Vol. II, 123.] We conclude that Cahn held a monopoly in the electromagnetic microbalance submarket.

2. *Misuse of Power Over Microbalances to Gain Sales of Millibalances*

Finding that Cahn holds a lawfully acquired monopoly [19] in the microbalance submarket is only the first step in resolving the § 2 issue. It must also be determined whether there was a misuse of the monopoly power resulting in injury to the plaintiff's business or property.[20]

A specific intent to monopolize need not be shown to establish the offense of monopolization when the monopolist undertakes anticompetitive actions, *United States v. Griffith, supra*, 334 U.S. at 105, 108; 1 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 8.02[4], p. 8-43 (1977 rev.) (hereinafter von Kalinowski). There are kinds of acts which would be lawful in the absence of monopoly but, because of their tendency to foreclose competitors from access to markets or customers or some other inherently anticompetitive tendency, are unlawful under § 2 if done by a monopolist, *e.g.*, the leasing practices in *United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295, 343 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); see also 1 von Kalinowski § 8.02[4] [b], p. 8-55. The anticompetitive quality of an act may depend, however, upon the purpose with which it was done. *E.g., Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927). The termination in this case is, we believe, such an act. Its lawfulness depends upon Cahn's purpose, which includes the purpose of the dealer reduction program pursuant to which the District Court found the termination was carried out.

Cahn offered evidence tending to prove that, because its balances were sophisticated instruments, a dealer's salesman needed training to sell them effectively. When Cahn's $600,000 in United States sales was divided among

[19] See note 14, *supra*.

[20] See text following note 14, *supra*.

too many dealers, each dealer's share of those sales was insufficient to provide an incentive for that needed training. Moreover, Cahn itself had only three salesmen, so its ability to train and assist dealer salesmen was limited. Reducing the number of dealers, according to Cahn, would ameliorate these difficulties with the result, in the words of Ventron's president, that "Cahn would get more sales per unit of sales effort."

Improvement of the efficiency of Cahn's marketing machinery in the manner just described would not be an improper purpose. While the possessor of lawfully acquired monopoly power may not use that power as leverage to deprive competitors of access to customers, to force customers to maintain resale prices, or in any other coercive manner, see *United States v. Griffith, supra*, 334 U.S. at 107-108, he is not forbidden from improving his efficiency in manufacturing or marketing, even though the effect of doing so will be maintain or improve his sales. Although the line between "superior skill, foresight, and industry" on the one hand, and conscious conduct evidencing "a persistent determination to maintain" a monopoly by "anticipat[ing] and forestall[ing] all competition," *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945), is sometimes difficult to draw, we think the kind of conduct we have described would not be unlawful.[21]

[21] The 1955 Report of the Attorney General's Committee to Study the Antitrust Laws states:

> The *Alcoa* case is not to be interpreted as penalizing enterprise; instead it declares illegal monopoly maintained by policies intended to discourage, impede or even prevent the rise of new competitors. (Footnote omitted) Att'y Gen. Rep. 60 (1955).

Von Kalinowski expresses the opinion that

> [c]areful analysis . . . of [the *Alcoa*] holding indicates that monopoly power will be condemned by the courts only when such power is maintained by policies intended to limit or prevent the entry of new competitors, or to exclude present competitors.

The District Court made no specific findings as to the purpose of the dealer reduction program, although it did find that it was a "program to consolidate [Cahn's] sales among its more effective dealers," and that the "activities complained of in this case were primarily for the legitimate objective of maintaining sales and profits." The judge found that the termination of Sargent-Welch was based on "the sharp decline in plaintiff's performance on behalf of Cahn and the lack of any indication that plaintiff's performance would improve in the future," *i.e.*, "poor performance," and on the dealer reduction program. Further, as we have noted, he found a failure of proof that Cahn refused to sell its microbalances to a dealer who would not handle millibalances; he found too that Cahn did not require its dealers to handle millibalances as a condition to continuing as a dealer. Also, however, he found that Sargent-Welch's "refusal to handle the millibalances may have been one reason why defendant terminated" the dealership.

These findings, especially because they include the one described last, do not logically exclude the possibility that either (a) a purpose of the dealer reduction program was unilaterally to use Cahn's market position in microbalances to further sales of millibalances to surviving dealers by causing them to fear that unless they handled millibalances they would not be able to buy microbalances, or (b) that, although the dealer reduction program did not have such a purpose, Cahn's action in terminating Sargent-Welch did. In either event, Cahn would have misused monopoly power in violation of § 2. *Cf. United States v.*

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1 von Kalinowski § 8.02[4], p. 8-62, n. 146. *Cf.* also *United States v. Griffith, supra,* 334 U.S. at 107; *United States v. Grinnell Corp.,* 384 U.S. 563, 570-571 (1966); *Telex Corp. v. International Business Machines Corp.,* 510 F.2d 894, 927-928 (10th Cir.), *cert dismissed,* 423 U.S. 802 (1975).

Griffith, supra, 334 U.S. at 106-107; *Lorain Journal Co. v. United States,* 342 U.S. 143, 153-154 (1951); 1 von Kalinowski, § 8.02[4], p. 8-54.

These possibilities must be the subject of further findings, which the judge who tried the case is in the best position to make.[22] We therefore remand for those findings. Appropriate conclusions of law and a supplemental judgment are to be entered on the remanded § 2 issue.

In its arguments, Cahn places considerable emphasis on the fact that its gross sales of balances are relatively small in amount, $608,400 in the United States and $1,400,000 in total in 1971, while Sargent-Welch is a large scientific supply house, representing over 3,000 vendors and selling annually over $60,000,000, whose purchases of Cahn products had dwindled to a level below $40,000 when it was terminated. The implication is that Sargent-Welch is cynically exploiting the antitrust laws although it has suffered little or no harm from the conduct complained of. It may be anomalous and even ironic that the antitrust laws may afford relief to the giant dealer against the small supplier. Yet we know of no exceptions to those laws based on the relative size or affluence of the parties. If the additional findings of the District Court lead to a determination that § 2 was violated, but Sargent-Welch has suffered little in-

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[22] Sargent-Welch argues that an inference not only of purpose to coerce but achievement of that purpose should be drawn from the evidence that millibalances were poor products and yet all the Cahn dealers who survived the dealer reduction program carried millibalances. That conclusion, however, may be negatived by other evidence, such as that indicating that the millibalances were greatly improved after their initial debut, that one model became very successful [Weil Dep. Vol. II, 84; Pl. Ex. 253], and that the discount schedule was improved [Yablonka Dep. Vol. III, 77; Vol. IV, 21]. Of some relevance is the court's finding that Sargent-Welch declined to handle millibalances "to attempt to pressure Cahn to improve the discounts" on microbalances.

jury as a result of the violation, the damages it will recover will be commensurately small.[*]

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

[* Occasional citations to the record and briefs of the parties are included in brackets in this slip opinion for the convenience of counsel and other representatives of the parties in their study of the opinion. Since the materials cited will ordinarily not be available to others, these bracketed citations will serve no further purpose when the opinion is published in the Federal 2d reports, and they, as well as this bracketed explanation, will therefore be deleted before the opinon is submitted to the publisher.]

APPENDIX D

Unpublished Order Not to Be Cited Per Circuit Rule 35

[CAPTION DELETED IN PRINTING]

Order

This order, filed with and supplementing the published opinion in this case, deals with the evidence on the price-fixing issue. Discussion of that evidence in the published opinion would occupy space in the Federal Reporter, Second without materially increasing the value of the opinion as precedent. The matter is therefore covered in this unpublished order.

A. *Sargent-Welch's Price-Cutting*

The District Court's finding that Sargent-Welch failed to prove that its price-cut in a bid to the University of California was a factor in the termination of its Cahn dealership was not clearly erroneous. First, there was sufficient evidence to support the sincerity of Cahn's explanation in its termination letter to Sargent-Welch. The author of the letter, Robert Faley, testified that his main reason for terminating Sargent-Welch was the dramatic decline in its sales volume from 1968 through the first quarter of 1971, together with his impression that nothing was being done to improve the company's performance. Cahn's general manager expressed the same view on a memorandum circulated after a visit to Sargent-Welch's corporate headquarters in the fall of 1970: in that memo, he characterized Sargent-Welch's attitude as "[g]enerally . . . apathetic. They didn't know what Cahn was doing or what their sales of Cahn products were or what the trend was."[1] [Def. Ex.

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[1] Plaintiff points to a statement in a market research report done for Cahn that Will Scientific had been terminated for price-cutting. This was clearly hearsay, however, gathered from unidentified Cahn employees. Moreover, the researcher who prepared the report testi-

82.] These weaknesses, Faley testified, were all the more important because Sargent-Welch's volume per branch was extremely low and the large number of salespeople involved would make it extremely difficult to improve that volume. [Faley Dep. Vol. I, 92.] Sargent-Welch's refusal of the millibalance line was viewed as simply another example of its bad attitude toward Cahn products in general. [Faley Dep. Vol. I, 15, 50; see also Lauenstein Dep. at 74.]

Second, while the correspondence outlined above indicates that termination could have been the "action" Cahn was threatening when it first inquired about the University of California price-cut, Cahn's treatment of its other dealers does not support that inference. A review of plaintiff's exhibits leads to the conclusion that the letter to Sargent-Welch was a routine part of Cahn's efforts to maintain its fair trade program. When, after investigation, Cahn found that a fair trade violation had occurred, it would ordinarily seek withdrawal of the offending bid or, if the sale had already been made, would require the dealer to purchase its next balance at list price, without the customary discount. [Yablonka Dep. Vol. V, 29.] There is no credible evidence that a dealer was ever terminated, or threatened with termination, for its failure to adhere to fair trade prices.[2] Nor was there evidence indicating that Cahn viewed

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fied that the information had been included merely as background, not as an indication of Cahn's current practice, and that at the time the report was written (1970) the episode with Will was considered "ancient history." [Brose Dep. 93.]

There was also some evidence that Cahn salesmen had raised the possibility of terminating or threatening termination in order to bring the worst price-cutter, Scientific Products, in line. But, as we note below, there was no evidence that his advice was ever acted upon.

[2] Sargent-Welch's Annaheim [sic] branch manager, Billy McKay wrote a letter to the company's president before submitting the

the price-cutting record of Sargent-Welch as more of a problem than that of the average dealer; in fact, there was testimony that Cahn considered Sargent-Welch average in that regard [Faley Dep. Vol. III, 106, 109], and that Sargent-Welch's own policy was to adhere to fair trade prices on Cahn products whenever possible.[3]

Faley's testimony that the University of California price-cut was not a factor in his decision to terminate Sargent-Welch [Faley Dep. Vol. I, 40] is supported by an internal memorandum from Cahn's general manager to Ventron's president giving the same reasons for the termination as those given by Faley in his letter to Sargent-Welch. [Pl. Ex. 10.] Faley's unequivocal testimony on this point was not fatally impeached by his later statement on which plaintiff relies, in which speaking of dealer terminations generally, he said that a dealer's price-cutting "if it was a consideration it was less than one percent." [Faley Dep. Vol. III, 118.]

Faley's testimony that the decision to terminate Sargent-Welch had been made several months before the price-cut, and that he had simply waited to see if Sargent-Welch's first quarter sales indicated a continued downtrend before writing the termination letter [Faley Dep. Vol. III, 109], seems plausible.[4]

University of California's bid [Pl. Ex. 354], because, as he testified, Sargent-Welch's general policy was to quote list prices on Cahn balances. [Tr. 1102.]

[3] See also Jerry Weil's testimony that Sargent had been the best dealer in his territory, but that, after its merger with Welch, "things went to hell in a basket." [Weil Dep. Vol. I, p. 48.]

[4] Sargent-Welch's Annaheim [sic] branch manager testified that no one from Cahn ever contacted him about the bid. [Tr. 1110.] He did, however, draft a proposed reply to Cahn, justifying the price-cut as necessary to meet unfair competition by Scientific Products, which he claimed was being unduly favored by Anthony Cassiano, Cahn's Western Regional salesman.

Plaintiff relies on the testimony of Cahn's Western Regional salesman, Anthony Cassiano, to the effect that Faley told him to let it be known "on the sly" that Sargent-Welch had been terminated because of the University of California price-cut. [Cassiano Dep. 6.] But this testimony was contradicted by Faley, who stated that, although he could not remember the particular conversation with Cassiano, he had never used Sargent-Welch as an example to keep the other dealers from price-cutting. [Faley Dep. Vol. I, 37, 41, 118.] Jerry Weil, Cahn's Eastern Regional salesman, testified that Faley's instructions to him were exactly the opposite and that he was under the impression that it would have been improper (as he said, a "no-no") to tell other dealers that Sargent-Welch had been terminated because of a price-cut, inasmuch as the reason for the termination was the company's low sales volume. [Weil, Tr. 1969, 1970, Dep. Vol. II, 154, 163-165.] In the face of such conflicting testimony, the District Court was entitled to credit Faley instead of Cassiano, who had left to form a new balance company, which received its first purchase order from Sargent-Welch.[5]

B. *Cahn's Dealer Reduction Program*

Sargent-Welch also alleged that Cahn's dealer reduction program was administered in furtherance of an illegal price-fixing scheme and that Cahn eliminated any dealers who refused to participate in a price-fixing conspiracy, after threatening all of them with termination if they did not do so. We think there was sufficient evidence to support the District Court's finding that the dealer reduction program was not designed or used for price-fixing.

In support of its theory that the program had price-fixing as an objective, Sargent-Welch points to testimony by Cahn officers that the dealers were very concerned about

[5] Weil was still with Cahn at the time he testified, but Faley had left the company to take a more promising job elsewhere.

price-cutting and that in particular Fisher Scientific, Cahn's largest dealer, urged it to cut back the number of dealers in order to end the price competition. [*E.g.*, Faley Dep. Vol. I, 166.] In response to this suggestion, Cahn's general manager, Jerry Yablonka, testified that he had "made clear our intent to hold prices to all dealers, by pointing out that three dealers had been cancelled this year and that we were prepared to cut back further."[6] [Pl. Ex. 11; Yablonka Dep. Vol. IV, 130-133.] Sometime later, Fisher decided to attempt unilaterally to hold the line on prices, and Cahn agreed to help "get the word out" to other dealers about Fisher's new position. Yablonka testified that he told Fisher, "if we had to lean on the dealers and cut back to a limited number, we would do it because we were serious about endorsing our fair trade posture." [Yablonka Dep. Vol. V, 42.]

Sargent-Welch argues that by aiding Fisher in this manner, Cahn was engaging in a conspiracy to fix prices. It also argues that there was evidence of a similar conspiracy with another dealer, Scientific Products. In June 1970 an internal Cahn memorandum, purportedly from Jerry Weil[7] to Faley's predecessor as Director of Market-

[6] Yablonka's testimony about this statement, which was made in a memorandum to the president of Ventron, was somewhat confused. At first he stated that he assumed he had conveyed this message to the dealers as a group,

> as a bit of bravado to get the dealers to stop cutting each other's throats in the fair trade areas and creating continuing problems of supervision back and forth.

[Yablonka Dep. Vol. III, 78.] Later in his deposition, however, he testified that the statement had probably been made to Fisher alone, and that it was unlikely that Fisher considered the statement a threat, inasmuch as it was Cahn's largest dealer, and would not be terminated for any reason. [*Id.* Vol. IV, 130-133.]

[7] Weil denied writing the memo and testified that it did not reflect Cahn policies. [Tr. 1964.]

ing, recommended taking action against Scientific Products:

> S/P can be hurting our entire operation and since they are doing very little creative selling, we may not be doing ourselves any good by keeping them as a dealer. If we went through the motions of cutting them off, I am sure they would then shape up. If we did cut them off, we would probably be able to recover at least 75% of the business that S/P is now giving us.

[Pl. Ex. 388.] There was no evidence that either of these recommendations was ever followed, but Cahn's general manager did note after a visit to Scientific Products' home office in the fall of 1970 that "[t]hey had always been the outstanding price cutters but are now dedicated to firming the pricing situation on the market." [Def. Ex. 82.] At the University of California, Scientific Products, which had supplied Cahn products in 1970, withdrew its low bid on Cahn's products in 1971. According to notes made by Sargent-Welch's Annaheim [sic] branch manager, however, Scientific Products made a belated attempt to reinstate their prior bid. [Def. Ex. 92.] And, as of August 1972 a Cahn internal memorandum was still recording price-cuts by Scientific Products, as well as complaints that they remained "the biggest price cutter in the business." [Pl. Ex. 405; Def. App. 41.]

We agree with defendants that the circumstantial evidence of a conspiracy between Cahn and Scientific Products is not compelling. Moreover, although Yablonka may have used the dealer reduction plan as a club to induce fair trade compliance, he did not begin working for Cahn until a week after Sargent-Welch was terminated. His predecessor, Faley, the evidence indicates, did not use it for that purpose at the time of Sargent-Welch's termination. Faley testified that, although price-cutting was a constant topic of conversation with the dealers, he never led dealers to believe they could be terminated for price-cutting. [Faley

Dep. Vol. I, 117-118, 123.] He specifically denied that the dealer reduction program was in any way designed to eliminate price-cutting, although he admitted that a "fringe benefit" of having fewer dealers would probably be a cessation of price-cutting activity. [*Id.* at 167.]

Even if the elimination of price-cutting in fair trade jurisdictions was a subsidiary goal of the plan, Cahn's fair trade program was not shown to be illegal outside California. A program to enforce a legal fair trade program would not be a violation of the Sherman Act's prohibition of price-fixing.

C. *Price-Fixing While Sargent-Welch Was a Dealer*

Sargent-Welch also alleged that it was injured by Cahn's enforcement of its fair trade program while Sargent-Welch was still a dealer. The District Court, while finding the program illegal in California, held that Sargent-Welch had failed to show that it was injured by the enforcement of that program. Even in a bifurcated trial on liability, such proof is necessary to satisfy the plaintiff's burden. See *Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307, 1320-1321 (5th Cir. 1976). Plaintiff's argument that the court's ruling was erroneous is based on its argument, rejected above, that Cahn's entire fair trade program, as well as its suggestion of retail prices in non-fair trade states, was illegal. Plaintiff presented no evidence of a causal linkage between Cahn's illegal fair trade program in California and a loss of sales or other injury. Thus, the District Court did not err in finding for the defendant on this claim as well.

In summary, we affirm the judgment of the District Court insofar as it denies relief on the price-fixing charges. Although the evidence on that subject consisted largely of documents and depositions, which we are of course able to evaluate for ourselves, we cannot say that the District Court's evaluation or findings based thereon were clearly erroneous.

APPENDIX E

JUDGMENT ON DECISION BY THE COURT
UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF ILLINOIS—EASTERN DIVISION

CIVIL ACTION FILE No. 72 C 2330

SARGENT-WELCH SCIENTIFIC Co., etc. *Plaintiff*

vs.

VENTRON CORP., etc. et al, *Defendants*

Judgment

This action came on for trial before the Court, Honorable Thomas J. McMillen, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that judgment is entered for defendants, with costs.

APPENDIX F

[CAPTION OMITTED IN PRINTING]

Decision

Plaintiff is a former distributor of some of defendant's products and as such was terminated by a written notice effective May 6, 1971. It has sued defendant for violation of Sections 1 and 2 of the Sherman Act, and Section 3 of the Clayton Act, claiming in substance that the termination was to enhance defendant's dominant or monopolistic position in a relevant market.

In a lengthy bench trial, plaintiff introduced evidence in an attempt to prove that defendant unlawfully terminated it as a dealer because (1) defendant was attempting to create or further a monopoly in a relevant market; (2) plaintiff would not market defendant's new products named Milibalances and thereby plaintiff conditioned or tied the sale of its microbalances to the Millibalances; and (3) plaintiff did not follow defendant's recommended resale prices in states where fair trade contracts were illegal.

Defendant introduced evidence that it terminated plaintiff in accordance with a plan to reduce the number of distributors and that plaintiff was selected because of a failure to sell defendant's products effectively. On the basis of the evidence and the post-trial arguments of the parties, we find and conclude that plaintiff has failed to prove by a preponderance of the evidence that the defendant violated the Federal anti-trust laws in terminating the plaintiff as a dealer and that defendant has proved a valid business justification for this act.

Trial was held on the issue of liability only. This involved merely a *prima facie* examination of the issue of damages as it related to proof of liability. The court ruled provisionally during trial that plaintiff had been damaged by the termination, although this was subject to reexamina-

tion in more detail if liability had been established. Neither party was allowed to submit more than a *prima facie* case on damages, and we find that plaintiff proved such a case. Since we have found no liability, we need go no further into the question of damages.

Monopolization and Attempt to Monopolize

A central issue on which plaintiff also has the burden of proof under Section 2 of the Sherman Act is the existence of a relevant product market which defendant allegedly has monopolized or has attempted to monopolize. On this issue, plaintiff contends that the relevant market consists of the manufacture and sale of devices often described as electromagnetic or electronic microbalances. These are electrically activated weighing instruments with a sensitivity of 1/1,000,000 of a gram (a microgram). Defendant makes several models of such balances, partly covered by patents, and sells more than 90 percent of those purchased in the United States. The parties do not contest that the market area is nationwide.

However, we find and conclude that the electronic or electromagnetic microbalance does not constitute a relevant market. First other companies compete with electromagnetic microbalances by selling microbalances which operate on a mechanical principle, often referred to as "analytical" microbalances. The mechanical models do have certain disadvantages, particularly when used under unfavorable environments involving vibration, pollution or noise. However, they also have advantages not found in the use of electromagnetic microbalances.

Secondly, in our opinion there is no reason to limit the relevant market to those balances with a sensitivity of one microgram. Balances are sold in the United States which measure particles with a sensitivity of 1/10,000,000 of a gram, usually called ultramicrobalances, and others whose sensitivity measures only down to 1/100,000 of a gram, e.g.

defendant's Millibalances. The functions served by these other balances overlap those performed by the microbalances and, as such, they stand in competition with one another. All constitute the generic product known as a precision balance. The defendant's share of this entire balance market is small, perhaps 8 percent.

Finally, non-gravimetric devices may be utilized to perform some of the measurement functions for which certain balances are used, e.g. measurements of the surface area or size of particles. The devices utilizing these alternative techniques to make such measurements are not balances, but they nevertheless compete in the same market. All of these products can perform comparable functions with various advantages and disadvantages, depending largely upon the particular end use involved. They compete for the same general class of customers—primarily scientific, industrial and educational laboratories—and the manufacturers of these various products view themselves as in competition with each other.

Plaintiff contends, alternatively, that the national microbalance market as a whole is a relevant one, although defendant does not manufacture or sell a mechanical or analytical balance. Plaintiff contends that by attempting to monopolize the microbalance market, defendant would eliminate the mechanical ones. There is no persuasive evidence that this has happened, however, and the mechanical's share of the microbalance market was larger in 1971 (23.6 percent) than it was in 1968 (17.7 percent).

Taking all of these factors into consideration, we find and conclude that no one product in the precision balance field constitutes a relevant market within the holding of such cases as *United States v. E.I. DuPont DeNemours*, 351 U.S. 377 (1956); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); and *United States v. Continental Can Co.*, 378 U.S. 441 (1964).

Plaintiff's attempt to define the market by the particular models which defendant manufactures has little to support it except to serve as a springboard for a charge of attempted monopolization. Defendant's position in the microbalance field, particularly those based on the electromagnetic principle, is due, in our opinion, to its patents, its skill and knowledge, and its aggressiveness. The evidence demonstrates that plaintiff's activities complained of in this case were primarily for the legitimate business objective of maintaining sales and profits. cf. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-1 (1966).

To prove an attempt to monopolize, plaintiff must show: (1) specific intent to obtain monopoly power in the relevant market; and (2) power to monopolize. *Holleb & Co. v. Produce Terminal Cold Storage Co.*, 532 F.2d 29, 33 (7th Cir. 1976). There is no persuasive evidence of intent on the defendant's part to monopolize the relevant market, as distinguished from a legitimate program to increase sales of electronic microbalances. Furthermore, defendant was without the power to monopolize any relevant market. The same charge made by terminated distributors has been rejected for similar reasons in *Mullis v. Arco Petroleum Corp.*, 502 F.2d 290, 295-97 (7th Cir. 1974); and *Tire Sales Corp. v. Cities Service Oil Co.*, 410 F.Supp. 1222, 1229-32 (N.D. Ill. 1976).

Alleged Tying Activities

In 1970, defendant developed a less-sensitive weighing instrument which it named "Millibalance". These have a sensitivity of 1/100,000 of a gram and operate on the electronic principle, as do all of defendant's balances. Because tying arrangements have a pernicious effect on competition, they are *per se* unreasonable if the plaintiff can prove: (1) that the defendant possesses sufficient power in the market for the tying product (electronic microbalances) to impose an appreciable restraint in the market for the tied product

(Millibalances); and (2) that a "not insubstantial" volume of commerce in the tied product has been restrained. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958). Under the Clayton Act, plaintiff need only prove one of these two elements, whereas the Sherman Act requires proof of both. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *Tire Sales Corp. v. Cities Service Oil Co.*, supra p. 6.

The weight of the evidence proves that plaintiff refused to handle the Millibalances because defendant would not sell it to dealers on as liberal a discount schedule as was in effect for microbalances. Also, since it was a new product, it had serious quality problems about which plaintiff was wary. The contract between the parties did not require plaintiff to purchase the new product, yet the evidence does not show that defendant's attempt to sell its Millibalances to the plaintiff tended to solidify its dominant electromagnetic microbalance position.

Nor do we find persuasive evidence that the two products were illegally "tied" or that defendant refused to sell its microbalances to a dealer which would not handle the Millibalance. Plaintiff's refusal to handle the Millibalance may have been one reason why defendant terminated plaintiff's dealership, but the motive was not to enforce a monopoly of microbalances. It was to have active and profitable dealerships which handled the full line, a reasonable and lawful objective. cf. *McGeorge Car Co. Inc. v. Leyland Motor Sales Inc.*, 504 F.2d 52 (4th Cir. 1974), cert. den. 420 U.S. 992 (1975). Indeed, if defendant were truly attempting to monopolize a microbalance market, it would hardly do so by terminating dealers who were successfully selling that product but who refused to sell a new product which has not been a success and which plaintiff contends is in a different relevant market.

Plaintiff has also failed to prove that defendant attempted to coerce plaintiff into handling these new products by, for example, threatening termination. Pressure by the seller is critical to the existence of a tie-in. See *Capital Temporaries, Inc. of Hartford v. Olsten Corp.*, 506 F.2d 658, 661-63 (2d Cir. 1974). Nor does the evidence show that competition in the market for the allegedly tied product, i.e., Millibalances, was lessened. Defendant did not limit plaintiff's ability to carry other manufacturers' products which competed with the Millibalances. Indeed, Sargent-Welch served at least seven other balance manufacturers as a distributor according to its own Catalog 119. Defendant merely sought to have plaintiff carry its full line of balances. Such a desire is not, in and of itself, anti-competitive. *McGeorge Car Co. Inc. v. Leyland Motor Sales Inc.*, supra p. 8; *Colorado Pump & Supply Co. v. Febco, Inc.*, 472 F.2d 637 (10th Cir. 1973), cert. den. 411 U.S. 987 (1973).

We recognize that plaintiff's failure to make out a *per se* violation does not obviate the need to consider defendant's conduct under the Rule of Reason. *Fortner Enterprises, Inc. v. United States Steel Corp., supra* p. 7 at 499-500; *Moraine Products v. ICI America*, 538 F.2d 134 (7th Cir. 1976). However, since no effective restraint on trade in the allegedly tied product was shown, but merely pursuit by the defendant of a reasonable and lawful business policy, we conclude that plaintiff is also not entitled to recovery under this more general analysis.

Resale Price Maintenance

Defendant also had a suggested resale price and wanted its dealers to abide by it. This was for mutual protection of profits. This is not a violation of the anti-trust laws if a dealer is not terminated for price-cutting or if the manufacturer does not have the requisite market power to threaten monopolization. *United States v. Grinnell Corp.*, supra p. 6. Defendant tolerated price-cutting when necessary to meet competition. It did not like it and tried to discourage it, but we do not read the exhortatory language of defendant's sales manuals to constitute a contract or a cause for termination.

Although we do not agree with defendant that the price maintenance language in various of its documents was limited to valid fair trade contracts situations, we do not find evidence that the termination of plaintiff was due to its isolated offer of a discount to the University of California in February 1971. Defendant did not terminate other dealers for price cutting which came to its attention. We find that the weight of the evidence does not show that it did so to plaintiff, and that the termination was for the business reasons already referred to.

We find that defendant's fair trade program was unlawful in California, albeit a fair trade state at the time of plaintiff's termination. See former *Calif. Bus. & Prof. Code* §§ 16900-16905. The record reveals that the defendant made a substantial number of direct sales of dealer-handled products to end-user customers in California between 1968 and 1971 and therefore competed with plaintiff and certain other dealers as a retailer. Consequently, defendant's fair trade program amounted to horizontal price-fixing, which is not exempted from the proscription of Section 1 of the Sherman Act by the Miller-Tydings and McGuire Amendments. *United States v. McKesson & Robbins*, 351 U.S. 305 (1956); *Ar-Ex Products Co. v. Capital Vitamin & Cosmetic Corp.*, 351 F.2d 938 (1st Cir. 1965).

However, since defendant did not terminate plaintiff for price-cutting, the point is unavailing. Furthermore, plaintiff has failed to prove that defendant's price maintenance agreements caused a loss of sales or profits or other injury to its business in any state where the agreements were invalid. See *Rea v. Ford Motor Co.*, 497 F.2d 577, 589 (3d Cir. 1974), cert. den. 419 U.S. 868 (1974).

The foregoing decision is an attempt to simplify an unnecessarily complicated case. Plaintiff's deposition testimony has been given weight where based upon a witness' personal knowledge or experience, but many of the questions and answers involve argument, hearsay or opinions about documents prepared by other persons. This type of testimony is not sufficiently probative, in our opinion, to sustain the charge of violating the anti-trust laws. Other depositions are cumulative or merely discursive. We have ruled on objections to deposition evidence and exhibits to the extent encountered and will assume that all objections and rulings in this case have been satisfied or waived unless, within ten (10) days hereof, a party requests a ruling on specific objections which have not been ruled on.

Plaintiff has presented its evidence in such manner and in such detail that it is difficult to describe concisely why we find that the weight of the evidence lies where it does. In an attempt to particularize our Decision, however, we adopt the defendant's Proposed Findings of Fact and Conclusions of Law, submitted January 6, 1976 and overrule the plaintiff's objections thereto, submitted February 2, 1976, as follows:

I. Findings of Fact

1. The plaintiff is Sargent-Welch Scientific Company ("Sargent-Welch"), a corporation incorporated under the laws of the State of Illinois, with its principal place of business in Skokie, Illinois. Sargent-Welch was formed by a merger between E. H. Sargent Co. and Welch Scientific Co. in May 1968. Plaintiff is, and for many years has been engaged in the business of manufacturing, distributing, and selling educational equipment, scientific equipment, laboratory instruments, and scientific instruments, among other products. Plaintiff's business is and has been carried on in interstate and foreign commerce from sales and distribution branches located in Skokie, Illinois; Anaheim, California; Birmingham, Alabama; Cincinnati, Ohio; Cleveland, Ohio; Dallas, Texas; Denver, Colorado; Detroit, Michigan; and Springfield, New Jersey; and in Weston, Ontario; Montreal, Quebec; and Vancouver, B.C., Canada. [Defendant's proposed par. 1].

2. Defendant Ventron Corporation ("Ventron") is a corporation incorporated under the laws of the Commonwealth of Massachusetts, with its principal place of business in Beverly, Mass. Ventron is, and for many years has been, engaged in the business of manufacturing, distributing and selling chemicals and electronic materials. Ventron also is engaged in the business of manufacturing, distributing and selling sophisticated research, laboratory and scientific instruments. Prior to January 1, 1974, the business described in the preceding sentence was conducted by Ventron's wholly-owned subsidiary, defendant Ventron Instruments Corp. ("VIC"). Ventron's business is and has been carried on in interstate commerce. VIC's business was carried on in interstate commerce. [Defendant's proposed par. 2].

3. Cahn Instruments Co. ("Cahn") was founded in 1956 by Lee Cahn, and it was engaged in business throughout the United States until November 1967. In November 1967, Ventron acquired all of the stock of Cahn from the estate of Lee Cahn and from Pat Gaskins. Thereafter, and up to the present, Cahn was and is operated as an unincorporated part of Ventron. Ventron operated Cahn through its wholly-owned subsidiary, defendant VIC, from 1967 through December 31, 1973, at which time Ventron acquired the assets of VIC. Cahn's business is and has been carried on in interstate and foreign commerce. [Defendant's proposed par. 3, modified].

4. Defendant's proposed paragraph 4 is stricken as surplusage.

5. E. H. Sargent Co., one of plaintiff's predecessor companies, was an authorized Cahn dealer (or distributor) from 1963 until May, 1968 when it merged with Welch Scientific Co. Hereafter plaintiff Sargent-Welch was an authorized Cahn dealer (or distributor) until it was notified by a letter dated April 6, 1971, that its dealership agreement was terminated by defendant's Cahn Division effective May 6, 1971. [Defendant's proposed par. 5].

6. In 1971, Sargent-Welch was a dealer (or distributor) for well over 3,000 vendors. It had two basic customer groups: 1) industrial and collegiate; and 2) elementary and secondary education. Prior to the merger in 1968, the former group had been served by E. H. Sargent Co. and the latter group by Welch Scientific Company. As previously indicated, Cahn's products had been handled by E. H. Sargent Co. They were sold primarily to industrial and collegiate customers and listed in the general catalog directed to that group. In 1971 that catalog was Sargent-Welch Catalog 119 (PTX 511). Approximately 20,000 to 22,000 different products and over 1,000 different vendors including Cahn are listed in Catalog 119. Cahn is identified as a vendor of balances. The following companies are also identified as balance vendors: Mettler, Ohaus, Sargent-Welch, Sauter, Seederer-Kohlbusch, Torsion, Roller-Smith. [Defendant's proposed par. 6.]

7. Defendant's proposed par. 7 is stricken as surplusage.

8. Cahn's total sales and income before federal but *after* state income taxes and before extraordinary items has been as follows:

Year	Sales	Income	
1968	$1,640,000	—	($561,000 before corporate charge)
1969	$1,590,000	—	($447,000 before corporate cahrge)
1970	$1,473,000	$181,637	($241,637 before corporate charge)
1971	$1,425,331	$182,900	($236,560 before corporate charge)
1972	$1,535,576	$125,981	($178,401 before corporate charge)
1973	$2,098,469	$251,437	($323,450 before corporate charge)
1974	$2,146,952	loss $81,222	($169,462 before corporate charge)

[Defendant's proposed par. 8.]

9. Weighing instruments are used to determine accurately the weight and other characteristics of a sample. "Weighing instruments" is usually used synonomously with balances. [Defendant's proposed par. 9, modified.]

10. and 11. Defendant's proposed paragraphs 10 and 11 are stricken as surplusage.

12. Since January 1, 1968, Cahn has offered for sale and sold in the United States the following balance models (excluding the Caratron and systems) in order of their introduction: M-10, GRAM, G-2, RG, RH, RTL, DTL, RM-2, R-100, 4100, 4400, 4600 and 4700. All of these models are or have been covered by the following patents: Patent Office Reg. Nos. 3,106,978; 3,224,512 and Re: 26,100. Cahn markets and has marketed all of these models (except the Caratron) under the registered trademark "ELECTROBALANCE" (Patent Office Reg. No. 675,209). In addition, Cahn markets and has marketed models RTL, DTL and RM-2 under the registered trademark "MILLIBALANCE" (Patent Office Reg. No. 907,965). Cahn models RTL, DTL and RM-2 are the only models to which Cahn has applied the trademark "MILLIBALANCE". [Defendant's proposed par. 12.]

13. All of the Cahn models employ an electromagnetic weighing principle, whereby a sample of unknown weight is balanced by the force produced by an electric current in a coil in a magnetic field. The weight of the unknown sample is determined by measuring the amount of electrical

energy used in balancing the sample, and calibrating this measurement against known weight standards. [Defendant's proposed par. 13.]

14. Each Cahn ELECTROBALANCE model is characterized by a set of features somewhat different from each other model in such respects as capacity, sensitivity, precision (reproducibility), readability, type of read-out, mode of operation and source of power. The chart which follows shows the principal features of each of the models in the Cahn ELECTROBALANCE line as of April 6, 1971 (the abbreviation ug. stands for microgram, 1/1,000,000 gram):

GRAM

Manual ELECTROBALANCE
Maximum Capacity 1.5 gm.
Maximum Sensitivity 0.1 ug.
Available in battery or line-operated version

G-2

Manual ELECTROBALANCE
Maximum Capacity 2.5 gm.
Maximum Sensitivity 0.05 ug.
Employing advanced beam position sensor for ease of operation

DTL

Top-loading ELECTROBALANCE
Maximum Capacity 10 gm.
Maximum Sensitivity 100 ug. (optional 10 ug.)
Fully automatic electronic digital readout
0-10V analog output; optional BCD output
Built-in calibration

RTL

Top-loading ELECTROBALANCE
Maximum capacity 10 gm.
Maximum Sensitivity 10 ug.
Mechanical digital readout
Built-in calibration

RH

Recording ELECTROBALANCE
Maximum Capacity 100 gm.
Maximum Sensitivity 2.0 ug.
Available with or without vacuum capability or with ultra-high vacuum capability

RG

Recording ELECTROBALANCE
Maximum Capacity 2.5 gm.
Maximum Sensitivity 0.1 ug.
Available with vacuum, high vacuum, and ultra-high vacuum capabilities

RM-2

Recording ELECTROBALANCE
Maximum Capacity 5 gm.
Maximum Sensitivity 5.0 ug.
Built-in recorder range expander and electrical notch filter

[Defendant's proposed par. 14A, modified.]

15. All Cahn balances are usable and used for a variety of diverse research, quality control, environmental and other testing applications. Each model has some applications to which it is better suited than others but no model is exclusively suited to any specific set of applications. [Defendant's proposed par. 15, modified.]

16. On April 6, 1971, Cahn notified Sargent-Welch that it was being terminated as an authorized dealer for Cahn ELECTROBALANCE products, effective May 6, 1971. [Defendant's proposed par. 16, modified.]

17. Plaintiff's termination as an authorized Cahn ELECTROBALANCE dealer was based upon the sharp decline in plaintiff's performance on behalf of Cahn and the lack of any indication that plaintiff's performance would improve in the future. It was also based on defendant's program to

consolidate sales among its more effective dealers. [Defendant's proposed par. 17, modified.]

18. Plaintiff's orders of Cahn products (i.e., Cahn's bookings to plaintiff) for all ten of its branches (i.e., Sargent-Welch's nine branches in the United States and its Weston, Ontario branch in Canada) had fallen from $148,000 in calendar year 1968 to $68,272 in calendar year 1969 to $39,728 in calendar year 1970. Its orders for the first quarter of calendar year 1971 were indicative of another low volume year; plaintiff's total orders from Cahn in the first quarter of calendar year 1971 were $12,253; in calendar year 1970 plaintiff's orders in the same period were $12,052. [Defendant's proposed par. 18, modified.]

19. Defendant's proposed par. 19 is stricken as irrelevant and in part as surplusage.

20. As an authorized Cahn dealer (or distributor) plaintiff purchased Cahn models GRAM, G-2, RG and RH, and accessories, and stocked, offered and sold them. In November 1969, Cahn introduced two new models, RTL and DTL, named Millibalances. In 1970 Cahn introduced another new Millibalance, model RM-2. The three new models called "Millibalances" were considerably less sensitive than defendant's other balances. They were also considerably less expensive. Plaintiff declined to handle these models. [Defendant's proposed par. 20, modified.]

21. Defendant did not require its dealers to handle the Millibalance models as a condition for continuing to be a dealer. [Defendant's proposed par. 21, modified.]

22. There were a number of factors contributing to the substantial deterioration in plaintiff's performance which resulted in the termination. None of these factors were attributable to defendant. [Defendant's proposed par. 22, modified.]

23. Sargent-Welch's management was well aware that its performance on behalf of Cahn had deteriorated substantially. [Defendant's proposed par. 23, modified.]

24. Various individuals and companies have used the terms "microbalance" and "electromagnetic microbalance" in different ways. The same is also true of terms such as "millibalance", "electromagnetic balance", "electrobalance", "analytical balance", "laboratory balance", "precision balance", "semi-microbalance", "ultra-microbalance", and terms such as "microweighing" and "microanalysis". [Defendant's proposed par. 24, modified.]

25. According to T.M. Mints, Jr., Sargent-Welch's President and Board Chairman, Catalog 119 is Sargent-Welch's "most important selling tool" (Trial Transcript p. 178). In the introduction to Catalog 119 Sargent-Welch refers to the "extraordinary thoroughness" of its indexing and states that "[e]ach item in the general index is entered by every probable terminology . . . ." There is a reference in the catalog's general index to "Micro balances"; however, only Mettler models M5, M5 S/A and UM-7 are listed there. The Cahn models are indexed under the terms "balance" and "Electrobalance" and the name Cahn. [Defendant's proposed par. 25, modified.]

26. The Cahn ELECTROBALANCE line has competed with a wide variety of products, including many balances with different designs and specifications which are not referred to as "microbalances" or "millibalances", and many products that are not balances. [Defendant's proposed par. 26, modified.]

27. The term "electromagnetic" refers to the principle on which all Cahn balance models and some of the balance models manufactured by its competitors operate. Cahn balances and other balances which operate according to the electromagnetic principle have competed with mechanical, mechanical-optical, electronic, electrical-mechanical, quartz

fiber and other kinds of balances. [Defendant's proposed par. 27, modified.]

28. In 1971 in the United States, Cahn competed against the following balance companies in varying extents:

a) Mettler Instruments Corp.

b) Sartorius (distributed in the United States by Brinkmann Instruments)

c) Beckman Instruments

d) Ainsworth

e) Sierra Technology

f) Torsion Balance Co. (Torbal)

g) C.I. Electronics

h) Roller Smith

i) Sauter

[Defendant's proposed par. 28, modified.]

29. The recognized leader in the balance business well before 1971, in 1971 and in subsequent years, has been Mettler. In 1971, Mettler offered approximately 50 balance models. This constituted the most complete line of balances offered in the United States by any company. Mettler well before 1971, in 1971, and in subsequent years, has been the leading manufacturer and seller of balances in terms of sales volume and pricing. [Defendant's proposed par. 29, modified.]

30. Defendant manufactured only about 8.2 percent of all precision balances in the United States in 1971, although it manufactured more than 90 percent of the electromagnetic balances sold in this country that year.

31. Cahn has been an innovator in the electromagnetic balance business and it has long been known for the high

quality and reliability of its ELECTROBALANCE products. Cahn was the first company to develop and market a commercially acceptable electromagnetic balance which operated on the electromagnetic, null-restoring principle. In 1965 and 1966, it obtained patents on certain aspects of its electromagnetic balances; features of all of the Cahn models are or have been covered by these patents. The Cahn electromagnetic balance was a technological breakthrough and it was several years before other larger competitors offered commercially acceptable electromagnetic balances which operated on the same or similar principles. [Defendant's proposed par. 31, modified.]

32. Cahn has emphasized selling by applications. Very often a variety of techniques is available (each utilizing different instruments or equipment) to solve a particular applications problem or achieve a given result. As the available techniques differ from one application to another, the products against which one or another Cahn ELECTROBALANCE model competes may also differ from one application to another.

A gravimetric technique involves the measurement of a weight, i.e., the force of gravity acting on a mass; gravimetric techniques employ balances (Trial transcript at page 650). In many instances, a person with an applications problem who is a potential customer for a Cahn balance will also have a number of non-gravimetric techniques available to him, which involve measurements of properties other than weight and can employ other kinds of scientific instruments or equipment. Cahn balances compete with the non-gravimetric instruments in several respects.

The third and fourth paragraphs on p. 46 of the Defendant's proposals are stricken as surplusage. [Defendant's proposed par. 32, modified.]

33. Cahn is well known for its efforts in disseminating technical information and research findings relating to

gravimetric techniques. Cahn has by its efforts created and expanded demand for its products. It has fostered the development of new uses of Cahn ELECTROBALANCES and has demonstrated that many measurements and analyses that have been made and are made using other kinds of balances or scientific instruments can be accomplished more quickly, more accurately, or more safely using a Cahn balance. [Defendant's proposed par. 33, modified.]

34. Cahn's sales volume has always been small. In 1971, its total sales of balances in the United States were $608,400 or 500 units; its total United States sales of those balances which plaintiff contends are part of the "electromagnetic microbalance market" were $495,900 or 359 units. [Defendant's proposed par. 34, modified.]

35. Cahn has never exercised the power to exclude competition illegally. It has never been dominant enough to do this in a relevant market. [Defendant's proposed par. 35, modified.]

A. Plaintiff's objection to Defendant's proposed par. 35A is sustained.

B. In 1971, Mettler began marketing the first of a new group of electromagnetic balances which include, among other models, the ME21 and ME22. The ME21 and ME22 are highly versatile balances which compete with many of the models in the Cahn line. [Defendant's proposed par. 35B, modified.]

C. In addition, a new company called Sierra Instruments Corporation (first named Sierra Technology) began producing a line of balances in competition with Cahn in 1971. Sierra was started that year by two former Cahn employees; it was put in business by an initial $25,620 order from the plaintiff, Sargent-Welch, in November of 1971. In 1972, Sierra was acquired by one of the recognized leaders in the scientific instruments business, Perkin-Elmer Corporation. In 1972, Sierra/Perkin-Elmer sold 38 bal-

ances. In 1973, Perkin-Elmer sold 85 Sierra balances. In the eight month period ending August 1974, Perkin-Elmer sold 102 Sierra balances as compared with Cahn's sale of 265 balances of the same general type. Sierra's success demonstrates the absence of any significant barrier to entry into the balance market in 1971-72. [Defendant's proposed par. 35C, modified.]

36A. Cahn has attempted to control the prices at which its products are sold at retail by fair trade agreements with dealers and suggested resale prices. Cahn has never controlled the prices of its products at the retail level in any other respect. [Defendant's proposed par. 36A, modified.]

B. Cahn has been dependent upon scientific equipment dealers for marketing its products, including Sargent-Welch, because (in addition to the foregoing factors) such dealers are much larger than Cahn, because Cahn ELECTROBALANCE products have represented only a small fraction of the total volume of products handled by such dealers; and because Cahn has lacked a large sales force capable of selling its products on a nationwide scale. [Defendant's proposed par. 36B, modified.]

C. Plaintiff declined to handle Cahn ELECTROBALANCE models RTL, DTL and RM2 to attempt to pressure Cahn to improve the dealer discounts applicable to the Cahn ELECTROBALANCE line. [Defendant's proposed par. 36C, modified.]

D. The plaintiff's objection to defendant's proposed par. 36D is sustained.

37. Cahn has never restrained, or attempted to restrain, any dealer from handling products that compete with Cahn ELECTROBALANCE products. Cahn never prohibited or tried to prohibit plaintiff from carrying competitive products.

38. Commencing in 1966 and during all relevant periods, Cahn had a fair trade program. Pursuant to this program, Cahn entered into annual fair trade contracts with all of

its dealers (or distributors), including plaintiff. [Defendant's proposed par. 38, modified.]

39. Cahn carried out its fair trade program in good faith and, to the best of its knowledge, in accordance with the requirements of the applicable statutes. Cahn dealers from time to time communicated to Cahn their concern about fair trade violations. But Cahn never agreed with any of its dealers to fix or control prices, except where authorized by applicable fair trade laws, and all Cahn dealers, including plaintiff, knew and understood that the minimum selling prices established by Cahn need only be adhered to in those states and as to those sales where fair trade was applicable. All Cahn dealers, including plaintiff, in fact sold Cahn balance products at less than the minimum retail selling prices established by Cahn on certain occasions, usually when necessary to meet competition. [Defendant's proposed par. 39, modified.]

40. Cahn did not solicit direct sales of its authorized dealer products, did not hold itself out as a dealer for such products, and did not maintain its own dealer outlets. However, to insure that sales were not lost to other balance manufacturers, Cahn accommodated end user customers by filling unsolicited purchase orders when they were sent directly to Cahn. In such instances, if a dealer had influenced the customer who submitted the direct order to purchase the Cahn product, the dealer received its dealer purchase discount as a sales commission. If a customer communicated with Cahn to request assistance in selecting an ELECTROBALANCE product, Cahn referred the customer to an authorized dealer. [Defendant's proposed par. 40, modified.]

41. During the period prior to the termination of plaintiff, Cahn solicited sales of and sold certain products direct to end users on a regular basis. These products were the Cahn magnetic susceptibility system and the Cahn model FA tablet weighing system. After the termination, Cahn

continued to sell these products on a direct basis. The magnetic susceptibility system and the FA tablet weighing system have never been handled by Cahn dealers.

42. During the period prior to Cahn's termination of plaintiff, Cahn sold to OEM (original equipment manufacturer) customers who, like dealers, purchase for resale. Customarily, some OEM customers purchase in large quantities (generally larger than those purchased by dealers) and specify substantial modifications from the standard designs of the Cahn ELECTROBALANCE models for inclusion in their integrated systems. [Defendant's proposed par. 42, modified.]

A. The activities described in part in pars. 40, 41 and 42 rendered defendant's fair trade agreement with plaintiff unenforceable in California where plaintiff violated the agreement by contracting to sell certain of defendant's products at a discount to the University of California in February 1971. However, defendant did not terminate plaintiff on account of this violation.

43. Cahn's dealer agreement with plaintiff provided:

> "Dealer is not authorized to sell CAHN PRODUCTS outside the United States of America nor to domestic distributors for shipment outside the United States of America, except with the specific written permission of CAHN for each separate transaction."

This provision permitted Cahn to insure that foreign customers received adequate technical assistance and service. Plaintiff never sought Cahn's permission to make a foreign sale or a sale to a domestic customer for shipment outside the United States and was never restrained from making such sales. Plaintiff, with Cahn's knowledge, stocked and sold Cahn ELECTROBALANCE products at its Weston, Ontario, Canadian branch during the period when plaintiff was a Cahn dealer.

44. According to its *prima facie* case and without prejudice to defendants' ability to overcome this case by the weight of the evidence, plaintiff was injured in its business and property as a direct and proximate result of Cahn's termination of plaintiff's distributorship. As a result of the termination, plaintiff was deprived of product sales and profits it would have been able to make but for the action of Cahn. Those products included Cahn electromagnetic microbalances, Cahn accessories, plaintiff's recorders sold in conjunction with Cahn recording electromagnetic microbalances, and other products sold in conjunction with Cahn electromagnetic microbalances and accessories. [Plaintiff's proposed par. 44, modified.]

The plaintiff's proposed subparagraphs to its finding 44 are not adopted.

45. Plaintiff's objection to defendant's proposed par. 45 is sustained.

II. Findings of Ultimate Fact

1. Cahn's termination of Sargent-Welch was not anticompetitive in either purpose or effect. Plaintiff's distributorship contract was terminated because of its poor performance. Neither an attempt at tying sales nor an attempt to enforce illegal resale price maintenance, nor a plan to monopolize, attempt to monopolize or eliminate competition was proved to be a factor in the termination. [Defendant's proposed par. 1, modified.]

2. Plaintiff has failed to show that Cahn combined or conspired with anyone to restrain trade or monopolize in violation of the antitrust laws.

3. Neither "electromagnetic microbalances" nor "microbalances" constitute a relevant market. [Defendant's proposed par. 3, modified in that balance of this paragraph becomes par. 4.]

4. Plaintiff has failed to show that Cahn had monopoly power or that there was ever a dangerous probability that Cahn would achieve such power in any relevant market. Moreover, even assuming that Cahn had monopoly power, plaintiff has failed to show that Cahn grew as a consequence of anything other than superior products, business acumen or historic accident, or that Cahn used such power in furtherance of the alleged monopoly.

5. Plaintiff has failed to show that Cahn's fair trade program was unlawful, except to the extent found on pages 10-11 supra. It has been established that Cahn was in competition with its dealers in California. In all other respects, plaintiff has failed to establish that Cahn's fair trade program was unlawful.

6. Plaintiff has failed to show that Cahn engaged in a scheme to require an unlawful tying agreement.

7. It has not been shown that plaintiff was restricted from selling Cahn products to any customer to whom it otherwise would have sold them.

III. Conclusions of Law

1. This court has jurisdiction over the subject matter of this action and over the parties.

2. Plaintiff has failed to establish a claim for relief under Count I of the Amended Complaint. (Section 2 of the Sherman Act.)

3. Plainitff has failed to establish a claim for relief under Count II of the Amended Complaint. (Section 1 of the Sherman Act and Section 3 of the Clayton Act.)

4. Plaintiff has failed to establish a claim for relief under Count III of the Amended Complaint. (Section 1 of the Sherman Act.)

5. Plaintiff has failed to establish a claim for relief under Count IV of the Amended Complaint. (Section 1 of the Sherman Act.)

6. Plaintiff has failed to establish a claim for relief under Count V of the Amended Complaint. (Section 2 of the Sherman Act.)

7. Moreover, pursuant to Section 4B of the Clayton Act (15 U.S.C. § 15b) plaintiff would be barred from damages arising out of any period prior to September 20, 1968, under any Count of the Amended Complaint. [This paragraph is adopted assuming defendants amend their answer to the Amended Complaint to conform to the evidence.]

8. Accordingly, plaintiff is not entitled to any recovery.

9. Defendants are entitled to their costs in defending this action. [Defendant's proposed par. 9, modified.]

ENTER:

/s/ THOMAS R. MCMILLEN
JUDGE, U.S. DISTRICT COURT

Dated: Nov. 1, 1976

Supreme Court, U.S.
FILED
JUN 16 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1566

SARGENT-WELCH SCIENTIFIC COMPANY,
Petitioner,

vs.

VENTRON CORPORATION AND VENTRON INSTRUMENTS CORPORATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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Dated: June 16, 1978.

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CITATIONS.

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Other Authorities.

Stern and Gressman, *Supreme Court Practice*, (4th Ed. 1969) 10-11

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Petitioner Sargent-Welch Scientific Company ("Sargent-Welch") seeks review in this Court of an interlocutory order of the Court of Appeals remanding the case in part to the District Court for additional findings of fact. None of the relevant considerations governing review on certiorari, as set forth in this Court's Rule 19, support the grant of Sargent-Welch's petition. Its petition for certiorari is, in fact, simply a brief on the merits. Moreover, Sargent-Welch raises no important legal issues, and its position rests entirely on factual premises rejected by the courts below.

QUESTION PRESENTED.

The District Court found, in a trial limited to issues of liability, that respondents' Cahn Division ("Cahn") did not refuse to sell its "microbalances" to dealers who did not handle its "millibalances"; that in particular Cahn did not attempt to coerce petitioner Sargent-Welch into handling "millibalances" and did not require its dealers to handle them as a condition to continuing to be a dealer in "microbalances"; and that there was thus no tie-in between "microbalances" and "millibalances." These findings were specifically affirmed by the Court of Appeals and are not challenged here by Sargent-Welch. The District Court further found that there was no lessening of competition in the market for "millibalances" as a result of any conduct by Cahn, and this finding likewise remains unreversed and unchallenged. The Court of Appeals, while holding that Cahn in 1971 had a monopoly position in a submarket defined as "electromagnetic microbalances,"[1] also held that this market position had been "lawfully acquired." It concluded that Cahn did not violate Section 2 of the Sherman Act in terminating Sargent-Welch unless Cahn had thereby sought to intimidate remaining dealers to carry millibalances, and remanded the case to the District Court for further findings on this issue.

Properly stated, the question presented is whether the Court of Appeals should have held, without remand to the District Court for further findings, that the Sargent-Welch termination was unlawful even apart from any question of Cahn's intent, despite the findings of the District Court and holdings of the Court of Appeals referred to above.

1. While respondents do not agree with the holdings of the Court of Appeals on the issues of relevant market and monopoly power, they have not filed a cross-petition for certiorari at this interlocutory stage of the proceedings. Respondents reserve the right to raise these issues in any subsequent appeal in the case.

STATEMENT.

A. Cahn's Termination of Sargent-Welch as a Dealer.

Prior to May 1971, petitioner Sargent-Welch was an authorized dealer for (among some 20,000 different products purchased from approximately 3,000 vendors) certain balances and accessories manufactured by Cahn, including several balance models sometimes referred to as "electromagnetic microbalances."

On April 6, 1971, following a 74% three-year decline in Sargent-Welch's performance as a Cahn dealer,[2] Cahn notified Sargent-Welch that this relationship was being terminated, effective May 6, 1971.

As the District Court found:

> "Plaintiff's termination as an authorized Cahn ELECTROBALANCE dealer was based upon the sharp decline in plaintiff's performance on behalf of Cahn and the lack of any indication that plaintiff's performance would improve in the future. It was also based on defendant's program to consolidate sales among its more effective dealers." (Pet. App. 45a-46a.)[3]

In like vein, the Court of Appeals concluded:

> "[T]here was sufficient evidence to support the sincerity of Cahn's explanation in its termination letter to Sargent-Welch . . . . *Sargent-Welch's refusal of the millibalance line was viewed as simply another example of its bad attitude*

2. As the District Court found, Sargent-Welch's orders of Cahn products had fallen from $148,000 in 1968 to $68,262 in 1969 (an average of only $6,827 for each Sargent-Welch branch) to $39,728 in 1970 (a branch average of only $3,973). Its total orders for all ten branches in the first quarter of 1971 were $12,253, as compared with $12,052 in the same quarter of 1970, and were thus indicative of another low volume year. (Pet. App. 46a.)

3. "Pet. App." refers to the Appendix attached to Sargent-Welch's Petition for Certiorari. The abbreviation "D.App." will be used to refer to respondents' appendix submitted with their brief in the Court of Appeals.

toward Cahn products in general." (Pet. App. 25a-26a; emphasis added.)[4]

B. The Parties.

1. Sargent-Welch.

Petitioner Sargent-Welch is a large scientific supply house with annual sales of approximately $60,000,000. (Pet. App. 5a-6a, 40a-41a.)

In addition to manufacturing many products of its own, Sargent-Welch in 1971 sold products which it purchased from approximately 3,000 vendors. (Pet. App. 5a, 42a.) These products comprised a wide variety of scientific laboratory instruments, apparatus, and supplies, and included certain balances and accessories made by Cahn and many other manufacturers of

4. Top management of Sargent-Welch had been well aware of the serious decline in Sargent-Welch's performance as a Cahn dealer.

On November 19, 1970, several months before the termination, Sargent-Welch's Marketing Vice President wrote to two Sargent-Welch employees: "Our own sales volume on Cahn instruments, as you know, has dropped substantially in the last year, and has been on the decline for two or three years." (DTX 79, D.App. 53.) One of the employees replied the next day: "I had the feeling long ago that our activity on Cahn products had declined. . . . Unfortunately, we have been unable to realize any change in the general trend." (DTX 80, D.App. 54.)

On April 16, 1971, shortly after receipt of the Cahn termination notice, Sargent-Welch's Vice President for Sales wrote to Sargent-Welch branch managers, in a memo entitled "The Cahn Franchise and Our Relations with Other Manufacturers": "Needless to say, this action against our company is humiliating, *even though our sales figures on Cahn products were so low last year that it is not a serious loss in sales volume.*" (DTX 97, D.App. 55; emphasis added.) He attributed the drop in Cahn sales to "a combination of the decline in our customers' capital equipment purchases *coupled with the lack of sales and promotional effort on the part of the salesmen and our sales management.* . . ." (DTX 97, D.App. 55-56; emphasis added.) Shortly thereafter, he wrote to one of his branch managers: "I must say, however, that if our interest in the product line is determined by our purchases from a manufacturer, then Cahn is correct in assuming that we did not actively promote their line." (DTX 100, D.App. 57.)

such products. (PTX 511, pp. 32-35; PTX 511, pp. 17-31, 36-59.)

2. Cahn.

Cahn is a small manufacturer of precision balances and accessories. In 1971 it sold a total of 500 balances in the United States, for an aggregate sales volume of $608,400. Its total sales in 1971 were approximately $1,400,000. (Pet. App. 5a.)

During the 1960's and early 1970's, Cahn developed and marketed a line of balances which operated on an electromagnetic or "null-restoring" weighing principle. In 1965 and 1966, it obtained patents which cover certain aspects of these Cahn balance models. All of these Cahn balance models, both "microbalances" and "millibalances," operate on this same principle, are covered by the same patents, and (with one exception not involved in this litigation) have been marketed under the registered trademark "ELECTROBALANCE." (Pet. App. 43a.)

Cahn was the first company to develop and market commercially acceptable balances which operated on the electromagnetic principle. These balances represented a technological breakthrough, and it was several years before Cahn's large competitors offered commercially acceptable balances which operated on the same or similar principles. Cahn was highly regarded as an innovator in its field, and its reputation was enhanced by the well-known high quality and reliability of its ELECTROBALANCE line. (Pet. App. 48a-49a.)

Most of Cahn's balance products were sold to dealers like Sargent-Welch for resale to the ultimate users. Cahn was dependent on its dealers for marketing its products. (Pet. App. 51a.) At the time of the termination of Sargent-Welch in 1971, Cahn's entire sales force consisted of three salesmen. (Pet. App. 21a.)

C. The District Court's Decision.

The District Court ruled in favor of defendants on all counts of petitioner's complaint, specifically finding that "plaintiff's distributorship contract was terminated because of its poor performance" and that no antitrust violation "was proved to be a factor in the termination." (Pet. App. 54a.)

The District Court also specifically found that the termination was (1) not an exercise of monopoly power or an attempt to monopolize any relevant market (Pet. App. 36a, 54a-55a), (2) not part of an effort by Cahn to "tie" sales of some of its products to others (Pet. App. 36a-38a, 54a-55a), and (3) not a result of any price cutting by Sargent-Welch. (Pet. App. 38a-39a, 54a.)

With respect to the monopolization and attempt to monopolize claims, the court also found that Sargent-Welch had failed to satisfy its burden of proof as to the relevant market, rejecting Sargent-Welch's proposal to limit the relevant market to "electromagnetic microbalances." (Pet. App. 34a-36a, 47a, 54a.) The District Court further found that Cahn did not intend and had no power to monopolize any relevant market, and that its success in its field was due to "its patents, its skill and knowledge, and its aggressiveness." (Pet. App. 36a, 48a-50a, 55a.) In addition, the court found that Cahn did not exclude and had no power to exclude competition illegally, and that there was in fact no significant barrier to entry into the balance market in the 1971-72 period. (Pet. App. 50a-51a.) The court concluded that Cahn's termination of Sargent-Welch did not restrain competition in the sale of any balances. (Pet. App. 36a, 38a, 54a-55a.)

The District Court also rejected Sargent-Welch's contention that its termination was part of an effort to enforce an illegal "tie-in" of Cahn's "millibalances" to its "microbalances." It specifically found not only that Sargent-Welch failed to prove that Cahn had "attempted to coerce plaintiff into handling [its] new products by, for example, threatening termination," or had "refused to sell its microbalances to a dealer which would not handle the Millibalance," but also that Cahn "did not require its dealers to handle the Millibalance models as a condition for continuing to be a dealer." (Pet. App. 37a, 38a, 46a.)

The District Court further found: "Nor does the evidence show that competition in the market for the allegedly tied product, i.e., Millibalances, was lessened," and "no effective restraint on trade in the allegedly tied product was shown." (Pet. App. 38a.)

D. The Decision of the Court of Appeals.

The Court of Appeals affirmed the District Court's findings and conclusions that the termination of Sargent-Welch was not the result of any violation by Cahn of either § 1 of the Sherman Act or § 3 of the Clayton Act. It rejected Sargent-Welch's contentions that its termination and Cahn's "dealer reduction program" were part of a conspiracy to maintain resale prices illegally. (Pet. App. 9a-11a, 25a-31a.)

It also specifically rejected Sargent-Welch's contentions that Cahn tied sales of its "millibalances" to sales of its "microbalances" and that Sargent-Welch's termination resulted from a "scheme of getting tie-ins." The Court expressly agreed with the District Court's findings that Sargent-Welch "failed to prove that defendant attempted to coerce plaintiff into handling [millibalances]," that there was no persuasive evidence that Cahn "refused to sell its microbalances to a dealer who would not handle the millibalance," and that Cahn "did not require its dealers to handle the millibalance models as a condition to continuing to be a dealer." (Pet. App. 13a-14a.)

Nor did the Court of Appeals take issue with the District Court's findings, referred to above, that the evidence did not show "that competition in the market for the allegedly tied product, i.e., Millibalances, was lessened," and that "no effective

restraint on trade in the allegedly tied product was shown." (Pet. App. 38a.)

The Court of Appeals held only one finding of the District Court clearly erroneous, *viz.*, that concerning the relevant product market. (Pet. App. 15a.) The Court held that "electromagnetic microbalances" constituted a relevant submarket (Pet. App. 15a-19a), and on that basis concluded that Cahn held a monopoly of that submarket by virtue of its high market share. (Pet. App. 15a.) However, the Court of Appeals agreed with the District Court that Cahn's market position was "lawfully acquired." (Pet. App. 15a, n. 14.)

Turning then to the question of whether such "lawfully acquired" monopoly power had been misused, the Court of Appeals noted that the District Court's findings did not specifically "exclude the possibility" that Cahn's "dealer reduction program" or its termination of Sargent-Welch was designed to cause "surviving dealers . . . to fear that unless they handled millibalances they would not be able to buy microbalances. . . ." (Pet. App. 22a.) The Court of Appeals therefore remanded the case for additional findings of fact and conclusions of law on "[t]hese possibilities," which, it stated, "the judge who tried the case is in the best position to make." (Pet. App. 23a.)

ARGUMENT.

Sargent-Welch seeks interlocutory review of an order of the Court of Appeals remanding the case to the District Court for more specific findings on certain issues. The question at issue turns solely upon an analysis of the particular facts in the case, including a determination of the proper factual inferences to be drawn from the evidence in the record. No contested legal issues of any general significance are involved. This is patently not a case where review by this Court on certiorari is either necessary or appropriate.

I.

THE PETITION PRESENTS ONLY FACTUAL ISSUES.

Sargent-Welch asserts (p. 12) the general principle, stated in *United States* v. *Griffith*, 334 U. S. 100, 105 (1948), that it is "not always necessary to find a specific intent to restrain trade or build a monopoly in order to find that the anti-trust laws have been violated." But that general principle is in no way at issue here.[5] Instead, the petition presents in substance only factual issues as to the application of that principle—the very reason why the Court of Appeals remanded the case to the District Court for clarification of its findings.

In the *Griffith* case, on the particular facts of that case, this Court proceeded "from the premise that the circuit buying power was unlawfully employed" (334 U. S. at 109) and that each defendant was "employing his monopoly power as a trade weapon against his competitors" (p. 107) and was "using monopoly power to expand his empire." (p. 108.) In that situation, this Court held that ascertaining the precise purpose of such conduct was not necessary *since the misuse of monopoly*

5. Indeed, the Court of Appeals expressly agreed with that principle, citing *Griffith*. (Pet. App. 20a.)

power had already been established. Here, by contrast, there has been no finding of misuse; indeed, the findings are all to the contrary. And the very reason for the remand is to obtain clarification on that issue from the District Court.

In an effort to make its petition appear to raise legal rather than factual issues, Sargent-Welch avoids explicitly challenging the findings of the lower courts. Instead, it simply injects factual assumptions and inferences into its argument which are either directly contrary to those findings or otherwise simply unsupported by the record. For example, Sargent-Welch attempts (p. 13) to draw the factual inference that Cahn's dealers were compelled to carry "millibalances" by Cahn's alleged use of a "full line criterion" in terminating some dealers—yet the Court of Appeals expressly declined to draw that inference. (Pet. App. 23a, n. 22.) Similarly, Sargent-Welch's assertion (p. 13) that the "results" of Cahn's alleged "full line policy" were "necessarily anti-competitive" contradicts the finding below that there was no evidence of any lessening of competition for "millibalances."

II.

THE DECISION BELOW IS INTERLOCUTORY.

It is plain that this is not the type of matter as to which this Court either ought to grant, or ordinarily does grant, a writ of certiorari, particularly at an interlocutory phrase of a case.

> "The Supreme Court will usually deny certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved . . . 'We do not grant a certiorari to review evidence and discuss specific facts.' *United States* v. *Johnston,* 268 U.S. 220, 227. . . . The Court is even less likely to take a case to review a factual issue—or to reverse on such an issue if certiorari is granted for some other reason—where the findings of fact made by the district court receive the concurrence of the court of appeals.
>
> * * * * *

> "The Supreme Court will not usually grant certiorari to review a nonfinal judgment, such as one remanding the case to the district court . . ." (Stern and Gressman, *Supreme Court Practice,* (4th Ed. 1969), pp. 172, 180.)

Even assuming, *arguendo,* there were any merit to petitioner's position, this Court's review at this juncture is clearly premature.

III.

THERE IS NO CONFLICT BETWEEN CIRCUITS.

In *Bragen* v. *Hudson County News Co.,* 321 F. 2d 864 (3d Cir. 1963), cited by Sargent-Welch (p. 14), the Court of Appeals reversed a judgment for defendant at the close of plaintiff's case in a jury trial, holding that "the plaintiff has made a sufficient showing [which] could enable a jury to find that [defendant's] business with plaintiff *was conducted through tying arrangements,*" and that the jury "could have found that *the real reason* why Hudson stopped dealing with plaintiff was because he refused to sell or display the unwanted items. . . ." (321 F. 2d at 869; emphasis added.) Here, to the contrary, it was found after a full trial that there was no tie-in; that finding was affirmed by the Court of Appeals; and the findings made so far in the case demonstrates that *"the real reason"* for Sargent-Welch's termination was its poor performance as a dealer.

In *SmithKline Corp.* v. *Eli Lilly and Co.,* 1978-1 Trade Cases ¶ 62,007 (3d Cir.), the District Court and the Court of Appeals agreed that both the purpose and the effect of the defendant's practices was to eliminate competition in an otherwise competitive market, thereby injuring the business of plaintiff, who was a direct competitor of defendant. (¶ 62,007 at p. 74,304.) Here, as stated previously, there has been no finding of either such a purpose or such an effect.

IV.

TO THE EXTENT THAT THE PETITION CONTENDS THAT MISUSE OF MONOPOLY POWER IS NOT AN ESSENTIAL ELEMENT OF MONOPOLIZATION, SUCH A CONTENTION WAS NEVER PRESENTED BELOW AND FURTHERMORE IS WHOLLY WITHOUT MERIT.

As already pointed out, the Court of Appeals remanded the case to the District Court for additional findings on the question of whether Cahn misused its purported monopoly power. Sargent-Welch apparently contends that such a remand is erroneous on the ground that misuse is irrelevant as a matter of law. If that is Sargent-Welch's position, then a further objection to the petition is that no such contention was made below. In both the District Court and the Court of Appeals, Sargent-Welch's argument (albeit unsuccessful) was that there had been such misuse—not that misuse was unnecessary. Moreover, no such contention was made in Sargent-Welch's petition for rehearing in the Court of Appeals.

In any event, such a contention is frivolous, particularly on the facts of this case. Sargent-Welch, it should be noted, does not challenge the findings of the courts below that Cahn's terminations of Sargent-Welch and certain other dealers did not violate Section 3 of the Clayton Act or Section 1 of the Sherman Act and had no anticompetitive effect in the market for "millibalances." Sargent-Welch also does not deny the Court of Appeals' statement that "the possessor of lawfully acquired monopoly power . . . is not forbidden from improving his efficiency in manufacturing or marketing, even though the effect of doing so will be to maintain or improve his sales." (Pet. App. 21a.)

Furthermore, in the very case on which Sargent-Welch chiefly relies, *United States* v. *Griffith*, 334 U. S. 100 (1948), this Court did not condemn monopoly power *per se* but instead

"... *the use of monopoly power* ... to foreclose competition, to gain a competitive advantage, or to destroy a competitor" (p. 107, emphasis added). In that case, moreover, it was found that the defendants had actively and successfully used their monopoly power in "closed" towns to restrain competition in competitive towns:

> "Appellees were concededly using their circuit buying power to obtain films. . . . Monopoly rights in the form of certain exclusive privileges were bargained for and obtained.
>
> * * * * *
>
> "On the record as we read it, it cannot be doubted that the monopoly power of appellees had some effect on their competitors and on the growth of the Griffith circuit." (334 U. S. at 109.)

In this case, however, the Court of Appeals expressly refused to accept Sargent-Welch's proffered factual inference that Cahn used its "monopoly" of "microbalances" to foist "millibalances" on reluctant dealers, citing specific evidence to the contrary. (Pet. App. 23a, n. 22.) Indeed, it specifically found that Sargent-Welch's failure to carry "millibalances," far from being used by Cahn as a separate and independent basis for the termination, "was viewed as simply another example of [Sargent-Welch's] bad attitude toward Cahn products in general." (Pet. App. 26a.) Moreover, as previously stated, it was found below that the evidence did *not* show "that competition in the market for the allegedly tied product, i.e., Millibalances, was lessened," and that "no effective restraint on trade" in millibalances was shown. (Pet. App. 38a.)

CONCLUSION.

Sargent-Welch cites no relevant considerations favoring a grant of certiorari in this case, and there are none. In addition, its position on the merits is without support in the record or in the law, and indeed depends on factual assumptions that are contrary to the findings of both courts below. For these reasons, Sargent-Welch's petition should be denied.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1978

No. 77-1566

SARGENT-WELCH SCIENTIFIC COMPANY, *Petitioner*

vs.

VENTRON CORPORATION AND VENTRON INSTRUMENTS CORPORATION, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 24(5) of the Revised Rules of this Court, Sargent-Welch Scientific Company respectfully submits this supplemental brief in support of its pending petition for a writ of certiorari. This brief discusses the relevant parts of the opinion in *United States* v. *United States Gypsum Co.,* U.S. Sup. Ct., O.T. 1977, No. 76-1560 (June 29, 1978), which was handed down after the petition was filed.

In *Gypsum,* this Court differentiated between the elements of proof in civil and criminal actions charging restraint of trade or "illegal monopolization" in

violation of the Sherman Act, 15 U.S.C. §§ 1, 2. Slip. Op. 13-14. On the civil side, the decision left "unchanged the general rule that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect." *Id.* at 11 fn. 13. As to criminal violations, however, the Court required proof of an unlawful purpose. But even in the criminal context, the Court rejected the notion that proof of unlawful purpose required "a demonstration that the disputed conduct was undertaken with the 'conscious object' of producing [anticompetitive] effects" (*id.* at 19) or with "a conscious desire to bring them to fruition or to violate the law" (*id.* at 21). Instead, the Court concluded—

> that action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws. *Id.* at 20.[1]

We contend that the Seventh Circuit erred as a matter of law by imposing upon petitioner in this civil antitrust action a more stringent burden of proving unlawful purpose than this Court deemed appropriate for criminal cases.

The critical issue before the Seventh Circuit was whether respondents' Cahn division had "violated § 2 of the Sherman Act by unilaterally using [its] monopoly power in microbalances to force unwanted millibalances on its dealers" (Pet. App. C, p. 14a

[1] In a footnote to the quotation in the text, the Court reaffirmed earlier holdings that conduct undertaken with the purpose of producing anticompetitive effects also can be criminal, "even if such effects did not come to pass. Cf. *United States* v. *Griffith*, 334 U.S. 100, 105 (1948)." Slip Op. 20 fn. 21.

(fn. omitted)). Sargent-Welch proved that it and the other Cahn microbalance dealers who refused to handle Cahn's millibalances were terminated pursuant to Cahn's dealer reduction program, while "all the Cahn dealers who survived the dealer reduction program carried millibalances" (Pet. App. C, p. 23a fn. 22). Each terminated dealer was advised by Cahn that one reason for its termination was the dealer's refusal to carry the millibalance line (Pet. 7-8); and, in Sargent-Welch's case, Cahn admitted that this fact was "very important" (PTX 9, A. 70). Sargent-Welch also proved—and the district court specifically found—that the "motive" for and the "objective" of Cahn's dealer reduction program was to do business through "full line" dealerships, *i.e.*, those which carried Cahn's line of millibalances as well as its line of microbalances (Pet. App. F, p. 37a).

Sargent-Welch proved, in sum, that Cahn's conscious objective was to have full line dealers—and that its objective was achieved, for only full line dealers survived the dealer reduction program. Moreover, the Seventh Circuit recognized that full line forcing by a monopolist would be an anticompetitive misuse of monopoly power (see Pet. App. C, pp. 14a-15a). The court concluded, however, that respondents would not be liable unless Cahn's "purpose" was "to further sales of millibalances to surviving dealers by causing them to fear that unless they handled millibalances they would not be able to buy microbalances" (Pet. App. C, p. 22a). The court thus ruled, as a matter of law, that petitioner's proof of Cahn's general purpose (desire or motive) to achieve an inherently anticompetitive end was insufficient to establish a violation of the Sherman Act, § 2.

That ruling is inconsistent with the holding of *Gypsum* that antitrust liability predicated on unlawful intent follows as a matter of law from proof that "'the defendant desired or merely knew of the practical certainty of the [anticompetitive] result.'" Slip. Op. 20. It also is inconsistent, as we argue in the petition, with the holding of *United States* v. *Griffith,* 334 U.S. 100, 106-107 (1948), that where monopolization is "a necessary and direct result" of a defendant's acts he is chargeable in legal contemplation with the requisite unlawful intent under § 2 of the Sherman Act.

The issue framed by the petition is squarely presented at this stage of the litigation, and a judgment in petitioner's favor would conclude the liability aspects of this case, which already is 5½ years old. For the district court to make further findings that are irrelevant under *Gypsum* and *Griffith,* and then for the appellate process to begin anew regardless of who prevails (see Br. in Opp. 2 fn. 1), would serve only to delay the ultimate disposition of the case without sharpening the issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

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RESPONDENTS' REPLY TO SUPPLEMENTAL BRIEF FOR PETITIONER.

In its Supplemental Brief for Petitioner, Sargent-Welch repeats the same contentions it made in its Petition for Certiorari, and succeeds only in demonstrating once again the wholly factual character of the issues presented by the interlocutory decision below.

Petitioner starts from the wholly fallacious premise that respondents "force[d] unwanted millibalances" on dealers (pp. 2-3) and, proceeding on that fallacious premise, argues that a legal issue is presented as to whether any further intention is required to violate Section 2 of the Sherman Act. However, as pointed out in our Brief in Opposition to the Petition for Certiorari in this case (pp. 6-8, 10, 12-13), both courts below refused to accept the premise on which Sargent-Welch now

relies. Contrary to petitioner's assertions, as the most elementary examination of the opinions below demonstrates, neither court found that respondents had "force[d] unwanted millibalances" on dealers.

It is also an egregious distortion to say, as petitioner does (p. 3), that "The court thus ruled, as a matter of law, that petitioner's proof of Cahn's general purpose (desire or motive) to achieve an inherently anti-competitive end was insufficient to establish a violation of the Sherman Act, § 2". Clearly neither court below found such a "general purpose". Indeed, it was to ascertain Cahn's purpose that the Court of Appeals remanded the case to the District Court for further findings. Nor did the Court of Appeals take issue with the District Court's findings that no lessening of competition or restraint on trade had been shown. Sargent-Welch is thus in the position of asking this Court to accept their own erroneous reconstruction of the decisions below as a predicate for deciding a fictitious legal issue.

Sargent-Welch calls this Court's attention to its recent decision in *United States* v. *United States Gypsum Co.*, 98 S. Ct. 2864 (1978), but that decision was not a Section 2 case and in any event did not in the slightest dispute the relevance of the *purpose* of conduct. It was for that reason, as already pointed out, that the Court of Appeals remanded this case to the District Court for further findings.

Sargent-Welch's Supplemental Brief thus merely confirms the conclusion previously urged by respondents: that the issues in this case are factual in nature, that the decision below is interlocutory and wholly in accord with the decisions of this Court

and other Courts of Appeals, and that the case is therefore inappropriate for review by this Court on certiorari.

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